The Relation Between Leniency and Private Enforcement

Towards an Optimum of Overall Competition Law Enforcement?

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The Relation Between Leniency and Private Enforcement

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The Relation Between Leniency and Private Enforcement

Towards an Optimum of Overall Competition Law Enforcement?

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Table of Contents

Preface

My interest for European law, and competition law in particular, mainly come from the enthusiasm of my university professors, K.J.M. Mortelmans, L.A. Geelhoed and J.W. van de Gronden. I started to take an interest in antitrust damages claims in 2006. It was the course of antitrust law at Duke University that opened my eyes on what was to be expected with regard to antitrust damages claims in Europe. An interesting topic that I could not - and still cannot - let go. The rise of antitrust damages claims created dozens of legal questions. One of the questions that interested me from the beginning was whether the leniency policy would be jeopardized by an upcoming private enforcement. The topic of my thesis was therefore an easy choice. But there would be a long road ahead. One with new initiatives from the legislators over and over again, a lot of new case law and dozens of judicial authors who wrote about the topic, all with different views and outcomes.

I am very much indebted to Prof. Johan van de Gronden for supervising my doctoral dissertation and for being helpful throughout the entire process. For example, I remember fondly of an evening in Utrecht at the chessboard table where we discussed my work with homemade waffles. I remember lively discussions about European law and competition law in particular. A love that we clearly share.

I would also like to thank Prof. Carla Sieburgh, Prof. Jörg Terhechte, dr. Catalin Rusu for taking part in the manuscript commission. I thank them for their valuable suggestions.

Last but not least, I thank my family and everyone who supported me during the time of writing. My special gratitude goes to Camilla for her patience and encouragement during the darker days of writing. She knew I would reach the finish line before I did.

Chapter 1

Introduction

1.1 Introduction

Policymakers and scientists often say that cartels harm consumer interests and therefore warrant severe administrative fines.[1] However, due to their secrecy, cartels are often difficult to uncover. To encourage whistle-blowing and disrupt cartels, the European Commission and Member States of the European Union ("Member States") have introduced a "leniency policy". To ease the cartel discovery and elimination process, cartel participants have been afforded a few limited opportunities to avoid or reduce administrative fines. This grants full or partial immunity from fines to a cartel participant that provides information to the European Commission or a national competition authority concerning a cartel. The competition authorities have been actively using this leniency policy to fight cartels. In fact, this is how the vast majority of European cartels have been discovered.

Especially at the beginning of this millennium, the European Commission also started to encourage a second measure called "private enforcement" to target competition law infringements and protect consumers. According to the European Commission, cartel victims should be encouraged and assisted to start civil proceedings against cartel participants.[2] It is expected that private enforcement will acquire a more prominent role in competition law in Europe.[3]

A problem that arises, however, is that private enforcement and the leniency policy may work against each other.[4] A company blowing the whistle on a cartel risks litigation, liability and financial risk. Legal and other scholars expect the leniency policy to become less attractive to managers basing their decision-making predominantly on financial risk.[5] Even a 100% fine reduction could potentially offer little incentive for a company if liability were hanging over its head like the sword of Damocles.

1. Verstager 2016. See also Appeldoorn & Vedder 2013, para I.I and p. 110.
2. Verstager 2016.
3. Rusu 2017, p. 796.
4. OECD 2015, p. 30; Buccirossi, Marvão & Spagnolo 2015, p. 2; Emmerich 2014, para 3; Vedder 2014, pp. 1 and 3 et seq.; Silbye 2011, p. 692.
5. See *inter alia* Wils 2007, pp. 57-58.

In fact, the European Commission was facing a dilemma. On the one hand, as a policy-maker it encourages private enforcement in line with European case law. On the other, as a public enforcer of competition law, the European Commission obviously tries to safeguard the functionality of public enforcement tools, specifically the attractiveness of the leniency programme, as a means of discovering cartels.[6]

1.2 Topic

The research question of this study is whether the rise of private enforcement in Europe would interfere with the effectiveness of the leniency policy. If the answer is considered in the affirmative, the study further examines whether and how the leniency policy can remain effective if more private enforcement actions take place.

To answer the first question, several sub-questions will have to be answered first. The study starts by describing what leniency is, how it works, and what makes a leniency policy effective. The study also highlights elements in legislation and practice that could be considered barriers to an effective leniency policy. In addition the study will answer the questions of whether private enforcement takes place, what the relevant developments are (on the EU and at national level), and what the connection and relation between leniency and private enforcement is and how they are intertwined.

To examine these questions the author will not only examine the systems in the European Union ("EU"), Germany and the Netherlands but also analyze the practice in the United States of America ("United States"), where both a leniency policy and private enforcement have co-existed for many years. By comparing the laws and practice in the EU, the Member States and the United States, the author will identify flaws and potential flaws in the European system. The author will make his own suggestions for a more effective system. He will also analyze the opinions and expectations of economists and legal scholars regarding the question whether leniency can remain effective if private enforcement actions increase.

Based on the findings, the author analyzes the solutions of the Antitrust Damages Directive[7] to prevent the emergence of private enforcement from jeopardizing the leniency policy. The author will also review the solutions provided by the Antitrust Damages Directive to remove the potential disincentive caused by this situation and examine whether and how the leniency policy could be even more effective.

6. *Cf.* Wilman 2016, pp. 906, 930 and 931 (footnote 242).
7. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

1.3 Comparative and Legal Approach

Legal scholars often state that one can come to an understanding of a legal system only by comparing it with another. A comparative approach can help to solve legal questions.[8]

This thesis will compare and evaluate the rules relating to leniency and private enforcement in the EU, the Netherlands, Germany, and the United States. The American leniency and private enforcement system serves as inspiration, with the EU, German and Dutch systems being the primary subjects of this research. As part of this comparative approach, the author will discuss and analyze the legislation, case law and literature of those countries.

Dutch competition law is a relatively new field. Until 1998, the Netherlands was considered a "cartel paradise".[9] As the Dutch economy became more open, however, it was important for businesses to be dynamic and able to respond promptly to international changes.[10] Cooperation between companies to protect market shares and benefits made the economy rigid and certainly not dynamic, thereby hindering the country's competitive position.[11] Dutch politicians realized that cartels were having a negative impact on the economy as a whole.[12] Therefore, a new law concerning competition came into force in 1998. Over the last decades, Dutch competition policy has changed drastically. Because Dutch competition law (as it is known today) has only applied for two decades, in order to conduct a thorough and more accurate European-American comparison of the policies of leniency and private enforcement, the situation in a second country within the EU (Germany) will be considered and examined.

The author chose Germany and the United States because of their history and development of competition law. In Europe Germany was one of the founding fathers of European competition law.[13] According to several German scholars, European competition policy was initially modeled on German competition policy.[14] Currently, German economists and legal scholars are holding lively discussions about competition law. They have thoroughly researched the effects of leniency policy and private enforcement and there are quite a few cartel damages claims pending in Germany. Furthermore, Germany is especially interesting as it was one of the first European countries to introduce special private enforcement action provisions into its legislation. Germany is also particularly interesting for another reason: the German competition authority, *Bundeskartellamt* ("BKartA"), has existed for more than 50 years. In contrast, the Dutch competition authority, *Autoriteit Consument & Markt* ("ACM"), has existed for around twenty years. Moreover, when the Dutch system of competition law and enforcement was created, the Dutch legislature

8. *Cf.* Koopmans 2003, pp. 1-14.
9. Van de Gronden 2017, p. 15; Mahler 2017.
10. Amador Sanchez, Dijkman, Lamboo & Smits 2008, p. 22.
11. Ibid.
12. Ibid.
13. Immenga 2008, pp. 3-19.
14. See *inter alia* Immenga 2008, p. 5.

closely mirrored EU competition law, but also certainly examined the German system as well.[15]

The United States influenced German competition policy because of its presence in Germany after World War II.[16] American competition law, or "antitrust law" as it is referred to in the United States, evolved at the end of the 19th century because of the necessity of protecting consumers from the rampant expansion, collaboration and consolidation of companies as a result of industrialization.[17] Since then, American antitrust law has become a model for the rest of the world on how to maintain a competitive market and protect consumers from anticompetitive behavior. The United States is particularly interesting because of its system of punitive damages, the assistance of claimants by leniency applicants and its far-reaching right of discovery.

1.4 Structure of the Dissertation

The aim of the study is to describe the existing systems in the EU, Germany and the Netherlands, to analyze their strengths and weaknesses and take a similar approach towards the system that is implemented following the Antitrust Damages Directive. The goal is to identify the options and opportunities for further improving the effectiveness of overall competition law enforcement, focusing on both the leniency programme and private enforcement.

Chapter 2 provides a broad overview of the leniency policy in the EU, Germany and the Netherlands. The aim of the research is to investigate whether the increase in private enforcement will jeopardize the leniency programme and render overall competition law enforcement less effective. By describing the leniency programmes, the author encountered several (other) characteristics of the leniency programmes of the EU and Member States, which potentially impede the effectiveness of the leniency programmes and overall competition law enforcement. Therefore, he also evaluates their effectiveness and provides an analysis of the interaction between the different programmes. Chapter 3 describes and evaluates the development of private enforcement on an EU level. Chapter 4 provides an overview and comparison of the private enforcement systems in Germany and the Netherlands. In Chapter 5, an overview of the leniency system and the system of private enforcement in the United States is provided. Chapter 5 also compares the American system with the private enforcement systems as discussed in Chapters 3 and 4. Chapter 6 brings the earlier chapters together. The bottlenecks and possible solutions for the bottlenecks encountered in the previous chapters are discussed; an attempt is made to solve the bottleneck problems and provide suggestions that would make overall competition law enforcement more effective. The conclusion of the study is in Chapter 7.

15. See *inter alia* Netherlands, Parliamentary Papers II 1995/96, p. 50. See also Netherlands, Parliamentary Papers II 2004/05, p. 9.
16. Bunte 2018, pp. 3-4.
17. Gifford & Kudrle 2015, p. 4.

1.5 Remarks

Impact on national civil law

The discussions on the Antitrust Damages Directive make clear that civil practitioners do not always agree with the pan-European changes influencing their national laws. The author is fully aware of the fact that the laws of the various Member States have merit in their own right. Because of the principle of proportionality and subsidiarity, European legislators must be reticent in introducing new legislation influencing national laws. However, pan-European rules are sometimes necessary. Differences in the laws and (legal) systems of the various Member States have led to forum shopping. In some Member States, undertakings are succeeding in their damages claims; in others, they are not. Some suggestions in Chapter 6 might not be in line with basic concepts in the civil-law systems in many of the Member States. However, pan-European legislation and the introduction of a competition law system with its own characteristics will not always fit perfectly with existing civil-law provisions that stem from the Napoleonic Code or even from Roman law. There is a Latin adage saying that changes could be necessary over the course of time: "*Tempora mutantur, nos et mutamur in illis*" ("Times change, and we change with them.")

Changes within the field of competition law

Competition law is a relatively new field of law, especially in the Netherlands. It is in constant flux with developments happening in rapid succession.[18] This study is based on the books, case law, articles, etc. that were available on 1 July 2017. Articles and case law published afterwards are possibly not incorporated into the study.

Changes in article numbering and terminology

Because of constant changes in the European law and the development of the European Union itself as an institution, the enumeration of competition law provisions has changed several times. For example, the former Article 81 of the EC Treaty is now Article 101 of the TFEU. Also, the names of courts and competition authorities have changed from time to time.

To keep the study readable, especially for those who are not familiar with the previous article numbers, names and terminology, the author has chosen to use the terms as they are today, even in references to older articles and institutions.

18. See *inter alia* Appeldoorn & Vedder 2013, p. vi.

Chapter 2

Leniency Policy of the European Commission, Germany and the Netherlands

2.1 Introduction

In the Antitrust Damages Directive, the leniency programme is described as a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives immunity from, or a reduction in, fines for its involvement in the cartel.[19]

Illegal cartels are often difficult to detect without the cooperation of the undertakings or individuals involved in them.[20] Therefore, the European Commission considered it in the EU's interest to reward undertakings that are willing to put an end to illegal practices and cooperate in the European Commission's investigation independently of the other undertakings involved in the cartel.[21]

Applying for leniency was, and still is considered as tattling and betraying, and therefore has a negative connotation. However, there is empirical evidence that leniency programmes are beneficial because they encourage the disruption of collusive practices and expedite the cartel investigation.[22] In fact, leniency programmes are now the main tool for the discovery and prosecution of cartels.[23] To be effective, it is important for the leniency policy to be effectively set and carried out. In the United States, for example, the amount of fines collected in 1993 was almost twice as high as in 1992, a significant increase in whistle-blowing attributable just to the

19. Antitrust Damages Directive, Article 2(15).
20. Reuter 2016, p. 483. See also Wils 2016, pp. 336-337; Vedder 2014, pp. 1 and 3.
21. European Commission 2006 (Notice on immunity of fines and reduction fines).
22. See e.g. OECD 2002, pp. 10, 13, 26 and 106; Borell, Jiménez & Carcía 2013, p. 111.
23. Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, p. 368 et seq. See also *inter alia* European Commission 2017 (Proposal Enforcement Directive), pp. 3 and 27.

modification of the leniency programme.[24] Similarly, the modification of the European Commission's leniency policy in 2002 (i.e. the introduction of full immunity) resulted in more applications for leniency.[25]

Chapter 2 describes the characteristics and developments of the leniency programme in the EU, Germany and the Netherlands in order to answer the question whether the leniency programme will be jeopardized, and overall competition law enforcement becomes less effective, by an upcoming private enforcement. By analyzing the leniency programmes, the author also encountered several characteristics of the leniency programmes and the application of the programmes in the EU and Member States, which potentially have a negative influence on the effectiveness of the leniency programmes and hence on overall competition law enforcement. Therefore, this Chapter also discusses the effectiveness of the leniency programmes and whether potential improvements exist.

2.2 Effective Leniency Policy

2.2.1 Introduction

Consumer welfare will increase if prices reach an equilibrium based on supply and demand. A cartel prevents this balance from being achieved because a cartel is formed to provide a surplus for the cartel infringers.[26] The underlying reason for competition law enforcement is that if cartels can be prevented, competition can be sustained, consumer welfare will be increased and the structure of the market will be balanced, and, thus, competition as such will be protected.[27]

As economist Spagnolo describes it, the most important objective of antitrust laws is avoiding the infringements (e.g. the cartel) from taking place.[28] Deterrence acts on a large number of potential infringements and considerably reduces prosecution costs.[29] He notes that *ex ante* deterrence is and should be the primary objective of law enforcement and the foremost criterion for the evaluation of its optimality and efficiency.[30]

When used correctly, leniency may appear to be a useful tool for uncovering cartels, sustaining competition and increasing consumer welfare.[31] The cooperation may consist of providing intelligence and evidence with respect to cartel violations as

24. Motchenkova 2005, § 1.3 and Chapter 5. See also Motchenkova 2004.
25. See *inter alia* Wils 2016, pp. 333-334; Hoang, Hüschelrath, Laitenberger & Smuda 2014, pp. 15-23; Billiet 2009, p. 14.
26. Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, pp. 369-370; Spagnolo 2008, p. 260. *Cf.* Verstager 2016.
27. CJEU 4 June 2009 (*T-Mobile v Netherlands and Others*), point 38. See also CJEU 6 October 2009 (*GlaxoSmithKline v European Commission*), point 63. *Cf. inter alia* Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, pp. 369-370; Motchenkova 2005.
28. Spagnolo 2008, p. 264. See also Van Lierop & Pijnacker Hordijk 2007, p. 14.
29. Spagnolo 2008, pp. 264-265.
30. Ibid.
31. *Cf.* Marvão & Spagnolo 2014, pp. 57-58; Bellamy & Child 2013, para 5.022.

well as admission of the violation and acceptance of remedial or compensatory measures.[32]

The leniency programme is based on game theory. Game theory relies on an abstract model to study how rational people make strategic decisions. By providing an incentive to the first self-reporting undertaking, the leniency programme in fact creates a "prisoner's dilemma".[33] If undertaking A is the first undertaking to report the cartel, it will not be fined. If undertaking A does not report the cartel, and the others also do not, it will again not be fined as long as the cartel is not uncovered by other means.[34] However, if competitor B reports the cartel to the competition authority first — out of fear of the others doing so first — undertaking B will not pay a fine but undertaking A will.

In 1978, the United States introduced the "Corporate Leniency Programme" to assist in identifying cartels. It was only in 1996 that the European Commission also introduced a policy of encouraging companies to report illegal cartel practices in exchange for immunity from or reduction of fines.[35] Similar rules have since been introduced in both Germany and the Netherlands.

To analyze whether the emergence of private enforcement may jeopardize leniency, it is important to determine what is considered to be an effective leniency policy, and how effectiveness can be achieved. The effectiveness of the leniency policy may be assessed by determining whether and to what extent the objectives of the leniency policy will be achieved with the existing policy. The author distinguishes between the "direct" and "indirect" objectives of the leniency policy. Direct objectives result directly from the leniency policy whereas indirect objectives are indirectly reached as a result of achieving the direct objectives.

2.2.1.1 *Direct Objectives*

The following objectives are categorized as direct objectives: uncovering cartels; collecting information and contributing evidence of the existence of cartels; and destabilizing cartels.

2.2.1.2 *Detecting Cartels*

The purpose of a leniency policy is to identify cartels in the first place.[36] Without information provided by at least one of the cartel participants, it is difficult to detect a cartel.[37] Point 8 of the Model Leniency Programme of the European Competition

32. *Cf.* Wils 2007, p. 25.
33. Silbye 2011, pp. 691 and 693; Spagnolo 2005, pp. 6 and 13.
34. For example, a cartel could also be revealed via officials that become aware of cartel violations during criminal investigations or (old) employees blowing the whistle.
35. Borell, Jiménez, Carcía 2013, p. 108.
36. See *inter alia* Wils 2016, pp. 336-337; Faull & Nikpay 2014, para 8.106; Marvão & Spagnolo 2014, p. 57; Bellamy & Child 2013, para 5.022; Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, pp. 368-369; Spagnolo 2008, pp. 262-263; Amador Sanchez, Dijkman, Lamboo & Smits, 2008, p. 35; Spagnolo 2005, p. 3; European Commission 2004 (Notice on Cooperation within the NCA), para 37.
37. Wils 2016, p. 336; European Commission 2017 (Proposal Enforcement Directive), p. 3.

Network ("ECN") states that a cartel constitutes a very serious violation of competition rules and is often extremely difficult to detect and investigate without the cooperation of at least one of the participants.[38] Mr Hammond of the Department of Justice of the United States ("DOJ") — the DOJ being one of the federal competition authorities in the United States, along with the Federal Trade Commission ("FTC") — states that the leniency policy is in fact responsible for the successful detection of most of the cartels that have been found:[39]

> "*While all of these tools are valuable and frequently utilized in our investigations, the fact is that the U.S. Corporate Leniency Program has directly led to the detection and successful prosecution of more international cartels than all of these other powers combined. Unquestionably, leniency programs are the greatest investigative tool ever designed to fight cartels.*"
> *(…).*
> *"Leniency programs have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in the United States, Canada, the EU and other jurisdictions. In the United States alone, companies have been fined over $2.5 billion dollars for antitrust crimes since 1997, with over 90 percent of this total tied to investigations assisted by leniency applicants. And there is more to come. Currently, the Division is investigating over 50 suspected international cartels operating on six continents. More than half of these investigations were initiated or are being advanced by information received from a leniency applicant."*

2.2.1.3 *Collecting Information and Proving the Existence of Cartels*

Proving the existence of a cartel is directly related to the detection of a cartel.[40] For successful prosecution it is necessary to have sufficient evidence of the existence of a cartel. Without the assistance of at least one of the cartel participants this is difficult to achieve. J-C Puffer-Mariette states: [41]

> *"Selbst wenn eine Wettbewerbsbehörde einen konkreten Anfangsverdacht gegen ein Kartell hat, wird sie in der Regel erhebliche Schwierigkeiten bei der Ermittlung und dem Nachweis eines Kartells haben. (…). Haben sich die Unternehmen im Vorfeld auf eine Durchsuchung der Wettbewerbsbehörde eingestellt, so ist einschlägiges Beweismaterial nur schwer auffindbar. Zudem wird die Wettbewerbsbehörde ohne einen Insiderhinweis nicht zielgerichtet vorgehen können. Selbst wenn sie bei Durchsuchungen potentielles Beweismaterial sicherstellt, wird die Auswertung häufig einen hohen Personalaufwand erfordern."*

Mr. Hammond of the DOJ has also made clear that a leniency application not only makes the existence of a cartel become apparent, but also assists in proving the existence of the cartel:[42]

38. *Cf.* Puffer-Mariette 2007, pp. 18-19.
39. Hammond 2004. See also Hammond 2000 (2).
40. See *inter alia* Faull & Nikpay 2014, para 8.107; Bellamy & Child 2013, para 5.022; Amador Sanchez, Dijkman, Lamboo & Smits 2008, p. 35; Wils 2007, pp. 41-42.
41. Puffer-Mariette 2007, p. 19.
42. Hammond 2000 (2). See also Wils 2007, p. 42.

> *"An effective Leniency Program will lead cartel members, in some cases, to confess their conduct even before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon the cartel stonewall, race to the government, and provide evidence against the other cartel members."*

2.2.1.4 *Destabilizing Cartels*

Another purpose of leniency policy is to destabilize existing cartels.[43] The system of leniency may create turmoil among the cartel participants. A leniency policy may cause unrest among cartel participants because it creates a lurking risk that other cartel participants will apply for leniency. If one of the cartel participants applies for leniency, it will leave the other cartel participants without the option to get immunity or a reduced fine. As said above, this can be considered a "prisoner's dilemma".[44] The reason why a participant in the cartel is likely to provide evidence against its partner in crime is because the authorities have the leverage of being able to offer a reduction in the penalty.[45]

Mr Hammond of the DOJ stated that the more anxious a company is about being caught, the more likely it is that it will apply for leniency: [46]

> "*The Race to the Courthouse. The more anxious a company is that its cartel participation may be discovered by the government, the more likely it is to report its wrongdoing in exchange for amnesty. Of course, amnesty is only available to the first one in the door. If you are second, even if only by matter of a few hours, which has happened on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution. This winner-take-all approach sets up a race, and this dynamic leads to tension and mistrust among cartel members*."

2.2.2 **Indirect Objectives**

In addition to the direct objectives, the following are indirect objectives: punishing cartels and returning to society the improperly obtained benefits; terminating cartels; and the deterrent effect.

2.2.2.1 *Punishing Cartels and Returning the Benefit Obtained*

As stated above, cartels have deleterious impact on consumers. After detecting and proving the existence of a cartel, the next step is to punish the cartel participants.[47] These days, cartel participants can expect severe punishments.

43. Wils 2016, p. 338; Amador Sanchez, Dijkman, Lamboo & Smits 2008, p. 35; Wils 2007, p. 42.
44. See Section 2.2.1. See also Faull & Nikpay 2014, para 8.108; McElwee 2004, p. 561.
45. *Cf.* McElwee 2004, p. 561.
46. Hammond 2000 (2).
47. Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, p. 369; European Competition Network 2006, p. 8; Spagnolo 2008, pp. 259 and 262-263.

As policymakers consider cartels bad for consumers, and hazardous for the economy, policymakers seek to make competition enforcement as effective as possible. The goal is to prevent a competition law infringer from obtaining a benefit from this misconduct.

Policymakers use (or consider using) the following three separate legal instruments to reduce cartel activities.

i. The first is administrative law, which is still the most important instrument within the European legal framework. Authorities may impose high administrative fines. Next to the high fines, authorities often inform the public about investigations and fines, which results in publicly naming and shaming of infringing undertakings. Developments in recent years include changes to the leniency policy and fines for the individuals directly involved in the cartel.
ii. The second is criminal law, several politicians believe that competition law violations are sufficiently serious to justify imprisonment as a sanction.[48]
iii. The third is private enforcement. The Court of Justice of the EU ("CJEU") has held that any citizen or business suffering harm as a result of a breach of EU antitrust rules should be entitled to claim reparation from the undertaking responsible for such damage. The CJEU has pointed out that EU law guarantees this right. Despite the existence of this right, it is the European Commission's opinion that private enforcement is not being relied on sufficiently. The European Commission has introduced the Antitrust Damages Directive to promote private enforcement within the Member States.

2.2.2.2 *Terminating Cartels*

In the detection and destabilization of cartels, an obvious aim is to end the cartel.[49] An undertaking that applies for leniency is normally required to immediately end its participation in the cartel. For example, point 13(1) of the ECN Model Leniency Programme 2012 makes clear that the applicant must satisfy the condition that its involvement in the alleged cartel is immediately ended with its application, unless its continued involvement would, in the competition authority's view, be reasonably necessary to preserve the integrity of the competition authority's inspections.

Also, other cartel infringers have an incentive to end a cartel because otherwise the cartel could attract additional severe punishments. Moreover, if other undertakings are no longer joining the cartel, the cartel will be less effective. Normally, a cartel can only remain functional if the relevant undertakings are joining it.

48. See *inter alia* Financieele Dagblad 2010, p. 3.
49. European Competition Network 2006, p. 8.

2.2.2.3 *Deterrence*

It has been a long-established principle in the science of criminology that the increased possibility of getting caught deters more than the severity of the punishment:[50]

> "*Es ist eine kriminologische Binsenweisheit, dass die Wahrscheinlichkeit des Entdecktwerdens mehr abschreckt als die Höhe der Strafe. Vor diesem Hintergrund wäre es wichtiger, mit funktionierenden und aufeinander abgestimmten Kronzeugenregelungen die Aufdeckungsquote zu erhöhen, als die Verstrafrechtlichung des Kartellrechts voranzutreiben.*"

One of the indirect objectives of a leniency policy is for undertakings to fear anticompetitive behavior with competitors more because the chance of getting caught and being fined is bigger where a leniency policy is effective (as it discovers and proves the existence of the cartel). The aim is to prevent undertakings from infringing anti-cartel provisions. In fact, the aim of the leniency programme is to act as a deterrent to participation in unlawful cartels.[51] As economist Spagnolo notes, deterrence is and should be the primary objective of law enforcement and is the foremost criterion for the evaluation of its optimality and efficiency.[52] Deterrence acts on a large number of potential infringements and provides large savings in prosecution costs.[53]

The chance of getting caught is considerably higher when there is a leniency policy.[54] Because more cartels have been detected and more undertakings have been punished heavily, undertakings are much more reluctant these days to participate in a cartel. Nowadays, often part of an undertaking's compliance policy is to safeguard that its employees at all times act in accordance with competition law. More and more undertakings organize — often with the assistance of external counsel — compliance training for employees in order to prevent undertakings from getting involved in anticompetitive behavior.

2.2.3 **Becoming Effective**

To make a leniency programme effective and reach the objectives referred to above, the leniency policy must take two main principles into account: (i) it is beneficial for an undertaking to apply for leniency; and (ii) the leniency policy is set and carried out in a clear, predictable and transparent way, with undertakings being treated equally.

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50. Schroeder 2006, p. 453; Bos & Struijlaart 2002, p. 232.
51. European Commission 2004 (Notice on Cooperation within the NCA), para 37. See also Bigoni, Fridolfsson, Le Coq & Spagnolo 2015, p. 665; Bellamy & Child 2013, para 5.022; Spagnolo 2008, pp. 262-263.
52. Spagnolo 2008, pp. 264-265. See also Van Lierop & Pijnacker Hordijk 2007, p. 14.
53. Spagnolo 2008, pp. 264-265.
54. See *inter alia* Hammond 2004. See also Motchenkova 2005, pp. 7-8.

2.2.3.1 *Cost-Benefit Analysis*

The most important underlying factor in choosing to apply for leniency is whether the application would be beneficial for an undertaking from a cost-benefit perspective. The financial risks, the personal risks and the rewards influence the decision to apply for leniency or not: [55]

> *"The reason why these concepts are at the heart of a successful leniency programme is that companies typically conduct a cost/benefit analysis in order to determine whether it is in their interest to co-operate with the Commission."*

To illustrate the above, the European Commission introduced its first leniency programme in 1996, with a possible fine reduction by up to 75 percent. In reality, there was little incentive to report the cartel to the European Commission without a guarantee of full immunity.[56] After the policy was modified, the 2002 leniency notice provided an applicant with full immunity if certain conditions were met. The 2002 leniency notice lead to around 167 applications for leniency until 2006.[57] In contrast, the 1996 leniency notice, which had been in place for a much longer period of time, resulted in only 80 leniency applications.[58] The cost-benefit analysis is influenced by a number of aspects, such as the following:

i. the chance of the cartel being detected;
ii. the chance of a cartel participant getting caught;
iii. the expected penalty (higher penalties lead to a more effective leniency policy, because they can result in larger benefits to leniency applicants);[59]
iv. the benefit of applying for leniency, e.g. a fine reduction and no imprisonment;
v. the effort required to make an application for leniency, including the hiring of external counsel and other costs;
vi. the information to be provided, e.g. whether this creates a risk of finding other infringements;
vii. the expected criminal sanctions or civil claims;[60]
viii. the expected public response;
ix. the effect of a leniency request on the undertaking's reputation; and
x. any personal punitive and/or financial implications for decision makers and other employees of the undertaking.

55. McElwee 2004, p. 559.
56. Billiet 2009, p. 14.
57. Ibid.
58. Ibid. The same is true for the leniency policy in the United States where the introduction of full immunity from fines resulted in more undertakings applying for leniency. See also Wils 2016, p. 334; Van der Meulen & Van Oers 2002, p. 160.
59. Wils 2007, p. 42; Motchenkova 2005.
60. Buccirossi, Marvão & Spagnolo 2015, p. 5; Guttuso 2014, p. 94; Silbye 2011, p. 692.

2.2.3.2 *Equality, Transparency, Predictability and Certainty*

For a leniency policy to be effective, and hence for it to achieve its direct and indirect objectives, it is also essential for the leniency policy to be set and carried out in a transparent, predictable and non-discriminatory way.

The experiences of various cartel authorities has showed that cartel participants are more willing to apply for leniency and cooperate with the competition authority if the latter provides transparency throughout the anti-cartel enforcement programme.[61] For example, the European Commission noted that companies considering leniency need a sufficient degree of legal certainty to be incentivized to cooperate.[62] The DOJ has acknowledged that transparency in enforcement policies maximizes cooperation.[63] It has taken into consideration several principles for creating the most effective leniency policy possible:[64]

> — *A robust, effective international anti-cartel enforcement program depends on cooperation from at least some of those who have engaged in the cartel activity.*
> — *Prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation.*
> — *Therefore, prospective cooperating parties need to know (1) the rules, (2) how prosecutorial discretion will be exercised in applying the rules, and (3) that they will be treated fairly and equitably.*
> — *An anti-cartel enforcement program maximizes the incentives for cooperation from cartel members if it has transparency in the elements of its enforcement program discussed in Part II, and it ensures proportional and equitable treatment of offenders as discussed in Part III.*

Hence, the DOJ's experience has been that transparency must include not only explicitly stated standards and policy, but also clear explanations of prosecutorial discretion in applying those standards and policies.[65] According to the DOJ, prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the programme. Uncertainty in the qualification process kills an amnesty programme.[66] Likewise, competition experts are also aware of the fact that the leniency policy should be equal, predictable, transparent and clear.[67] Competition law practitioner Voet van Vormizeele makes clear that there is a direct relation between the effectiveness of the leniency policy and the level of certainty felt by the leniency applicant:[68]

> "*Unter der alten Bonusregelung hatte sich das Bundeskartellamt immer noch einen Ermessenspielraum hinsichtlich der Nichtfestsetzung ein der Geldbuße vorbehalten.*

61. See for example Wils 2016, p. 345; Hoang, Hüschelrath, Laitenberger & Smuda 2014, p. 17 et seq.; Spratling 1999 (2).
62. European Commission 2017 (Proposal Enforcement Directive), p. 3.
63. Hammond 2000 (2).
64. Spratling 1999 (2). See also Hammond 2004; Hammond 2000 (1).
65. Hammond 2000 (2).
66. Ibid.
67. McElwee 2004, p. 559.
68. Voet van Vormizeele 2006, p. 293.

> *Hierdurch* [i.e. with the adjusted policy with less discretion] *wird natürlich die Rechtssicherheit für die betroffenen Kartellbeteiligten erheblich erhöht: In der Vergangenheit hatte sich gezeigt, dass allzu weite Ermessenspielräume in kartellrechtlichen Kronzeugenregelungen deren Effektivität erheblich mindern konnten.*"

2.2.4 Interim Conclusion

Leniency appears to be an important instrument for fighting cartels. A leniency policy is more effective if more cartels are destabilized, detected, proved to exist and punished. Furthermore, a leniency policy can be considered more effective if penalties for cartel infringements are more of a deterrent and cartel activities are more often ended.

To ensure that a leniency policy is effective, the undertaking applying for leniency should have an incentive from a cost-benefit perspective to apply for leniency. The undertaking needs to benefit from its application. Furthermore, it is essential for a leniency policy to be set and carried out in a clear, predictable, transparent and non-discriminatory way.

2.3 Leniency Policy of the European Commission

2.3.1 Introduction

In its notice on immunity from fines and reduction of fines in cartel cases, the European Commission states that the interests of consumers and citizens in the detection and punishment of illegal cartels outweigh the interest in fining those undertakings that enable the European Commission to discover cartel practices.[69] The European Commission considers that an undertaking's collaboration in the discovery of the existence of a cartel has intrinsic value.[70] A decisive contribution to the opening of an investigation or to the finding of an infringement justifies granting the undertaking in question immunity from any fine.[71]

The European Commission introduced its first leniency policy in 1996, with a possible fine reduction by up to 75 percent.[72] Before 1996, the European Commission had already been reducing fines or even abstaining from imposing fines in recognition of cooperation received in a number of cases.[73]

With the introduced leniency programme, the reality was that there was still little incentive to report the cartel to the European Commission. This was because the programme lacked a guarantee of full immunity.[74] In 2002, the policy was refined

69. European Commission 2006 (Notice on immunity of fines and reduction of fines), point 3.
70. Ibid, point 4.
71. Ibid.
72. European Commission 1996 (Notice on non-imposition or reduction of fines). See also Billiet 2009, p. 14.
73. Wils 2007, p. 35.
74. Billiet 2009, p. 14.

and extended.[75] Full immunity from fines became available.[76] The European Commission revised its leniency policy again in 2006 to provide greater guidance and clarity to immunity applicants in assessing the information and evidence required to meet the immunity threshold.[77] Furthermore, the European Commission introduced the concept of a "marker".[78] With a marker, the cartel participant who comes first is able to contact the European Commission to declare its willingness to cooperate. The timing of the placement of the marker is decisive for the status of the application.

A more elaborate explanation of European competition law and the leniency programme as such will be provided in the sections that follow. This explanation starts with a brief overview of the main rules of EU competition law in Section 2.3.2.[79] Competition law in general will be discussed first. The three pillars are (i) cartel prohibition, (ii) abuse of a dominant position and (iii) merger control. Similar pillars also apply in the individual Member States. As the rules are rather similar in the various Member States, these will not be discussed again when specifically discussing the German and Dutch leniency policies in the next sections that follow.

In Section 2.3.3, the role and powers of the European Commission as the competition authority will be discussed. Section 2.3.4 describes and analyzes the leniency policy rules of the European Commission. Section 2.3.5 describes how the European Commission's leniency policy works in daily practice. Section 2.3.6 follows with an evaluation of the European Commission's leniency policy.

2.3.2 Rules of Competition Law

To protect and improve competition within the EU, there are three main competition law pillars.[80] These three pillars are (i) cartel prohibition, (ii) abuse of a dominant position, and (iii) merger control. Undertakings active in the European market are required to comply with the rules set out as part of the legal framework for each pillar.[81] The Member States have similar legislation to prevent undertakings from infringing competition law. Below the three pillars will be described briefly. In fact, for the study of the relationship between leniency and private enforcement, the cartel prohibition is the most important pillar, as the leniency programme only applies to this particular infringement.

In addition to the rules under these three pillars, there are also other principles that affect European competition policy, including procurement law, Article 107 TFEU (State Aid), Article 106 TFEU (former Article 86 EC) and the useful effect or state action doctrine of Article 4(3) Treaty on European Union ("TEU") (former Article

75. European Commission 2002 (Notice on immunity of fines and reduction of fines).
76. Billiet 2009, p. 14.
77. See *inter alia* Wils 2016, p. 328; ABA 2006.
78. See *inter alia* Frese 2007, p. 52 et seq. See also Demetriou & Gray 2007, p. 1434.
79. See more comprehensively discussed Van de Gronden & De Vries 2006, pp. 32-66.
80. See *inter alia* Essers 2009, p. 584.
81. *Cf.* Van de Gronden & De Vries 2006, p. 33.

10 EC) in conjunction with Article 101 or 102 TFEU.[82] Because they are not directly relevant for this study, they are not further discussed.

2.3.2.1 *Cartel Prohibition*

The European Commission makes clear that the objective of cartel prohibition is to protect competition as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.[83]

Article 101 of the TFEU prohibits agreements and other collusive behaviour between undertakings that restrict competition and affect trade between Member States.[84] The Antitrust Damages Directive defines a cartel as an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and purchasers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.[85]

The purpose of Article 101 TFEU is to preclude restrictive agreements between independent market operators, whether horizontal (i.e. between parties operating at the same level of the economy) or vertical (i.e. between parties operating at different levels), thus promoting effective and undistorted competition in the market. In 1966, the CJEU held that vertical agreements could also breach competition rules. In the landmark decision in the *Consten v Grundig* cases, the CJEU stated that:[86]

> "*Competition may be distorted within the meaning of article 85(1)* [now 101 TFEU] *not only by agreements which limit it as between parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and functioning in the economy.*"

Under Article 101(2) of the TFEU, any agreement or decision violating the cartel prohibition is void.[87]

If an agreement is considered to restrict trade and competition within the meaning of Article 101(1) of the TFEU, it may still be exempted from the prohibition, based on Article 101(3) of the TFEU. This requires fulfilment of the four cumulative conditions referred to in that provision. They are as follows: (i) improvement of production, distribution or promotion of technical or economic progress, (ii) fair share

82. *Cf.* Van de Gronden & De Vries 2006, p. 33.
83. European Commission 2004 (Communication on Article 81(3)), para 2.2.1.
84. Van Bael & Bellis 2010, p. 15.
85. Antitrust Damages Directive, Article 2 (14).
86. CJEU 13 July 1966 (*Établissements Consten and Grundig-Verkaufs-GmbH v European Commission*), p. 339.
87. See *inter alia* Ligteringen 2016, pp. 24-25.

of the resulting benefit for consumers, (iii) indispensability of the restriction of competition, and (iv) no elimination of competition.

Article 1 of Regulation No 1/2003 makes clear that the European Commission has no (longer) sole jurisdiction to grant an exemption under Article 101(3) of the TFEU. Thus, the national competition authorities and national courts are entitled to apply this TFEU exemption as well. Article 101(3) of the TFEU is now a legal exemption based on a self-analysis conducted by the parties involved.[88] Article 101(3) of the TFEU does not exclude certain types of agreement from its scope.[89] As a matter of principle, the exemption covers all restrictive agreements fulfilling the four conditions of Article 101(3) of the TFEU. However, agreements that severely restrict competition are unlikely to fulfil the 101(3) conditions. Such restrictive agreements are usually blacklisted in block exemption regulations or identified as hard-core restrictions in European Commission guidelines and notices. Agreements of this nature generally fail to meet at least the first two conditions of Article 101(3). They neither create objective economic benefits nor benefit consumers.[90]

After the introduction of Regulation 1/2003, agreements between undertakings with possible consequences for competition were no longer subject to the requirement to give notice of them to the European Commission. As described, since Regulation 1/2003 it has been up to the undertakings themselves to assess the legality or illegality of their actions. Although block exemptions already existed prior to Regulation No 1/2003, the aforementioned procedural change affected the importance of these block exemptions. By granting block exemptions, the European Commission employs its power to exempt certain agreements for the purpose of providing transparency and legal certainty for undertakings.

In its guidelines on the application of Article 101(3) of the TFEU, the European Commission pointed out in which cases the conditions of Article 101(3) of the TFEU will be met.[91] The guidelines are non-binding and without prejudice to the case law of the CJEU and the EGC concerning the interpretation of Article 101(1) and (3) of the TFEU or to the interpretation that the courts of the European Union place on those provisions.[92]

2.3.2.2 *Abuse of a Dominant Position*

Insofar as it may affect trade between Member States, the abuse of a dominant position by one or more undertakings within the EU or a substantial part of it is prohibited under Article 102 of the TFEU. Such an infringement is comprised of two elements: (i) there must be a dominant position; and (ii) there must be abuse.[93]

88. *Cf.* Van de Gronden & De Vries 2006, para 2.1.1.
89. European Commission 2004 (Communication on Article 81(3)), point 46.
90. European Commission 2004 (Communication on Article 81(3)).
91. Ibid.
92. Ibid. *Cf.* CJEU 18 January 2017 (*Toshiba Corp. v Commission*), points 67 and 72. *Cf.* Van Lierop & Pijnacker Hordijk 2007, p. 21.
93. Van de Gronden & De Vries 2006, p. 34 et seq.

Article 102 of the TFEU does not define the term "dominant position." However, the practices of the European Commission and the case law of the European courts have clarified the concept.[94] In the case of *United Brands*, the CJEU defined a dominant position as a position of economic strength enjoyed by an undertaking that enables it to prevent the maintenance of effective competition on the relevant market by empowering it to behave, to an appreciable extent, independently of its competitors and ultimately its consumers.[95] A dominant position exists when an undertaking is able to act (relatively) independently because of its economic strength, without fear that competitors (or new entrants) will effectively compete.

The concept of *abuse* relates to the behavior (i.e. exploitative, exclusionary, or structurally abusive behavior) of the undertaking holding the dominant position.[96] Through recourse to methods which differ from those conditioning normal competition, this abuse has the effect of hindering the maintenance of the level of competition still existing in the market or the growth of that competition.[97] This abuse is not only aimed at practices that cause damage to consumers directly, but also those detrimental to them through their impact on an effective competitive structure.[98] Examples of abuse of a dominant position are *inter alia* predatory pricing[99], tying,[100] refusals to deal,[101] and refusals to provide access to essential facilities.[102]

For undertakings entrusted with tasks of general interest, an infringement of Article 102 of the TFEU may be justified under Article 106(2) of the TFEU. The Article 106(2) exemption also applies to cartel infringements under Article 101 of the TFEU.[103]

As mentioned before, the pillar of the abuse of dominant position is not particularly relevant for the effect of an upcoming private enforcement for the effectiveness of the leniency programme, as the relationship with the leniency policy is lacking. However, private enforcement of cartel infringements and the abuse of a dominant position are narrowly connected. Civil enforcement cases in relation to the abuse of a dominant position are often also relevant for cartel damages cases.

2.3.2.3 *Merger Control*

The EU and its Member States are of the opinion that concentrations (i.e. mergers and acquisitions) should not lead to a significant impediment of effective competi-

94. Van Bael & Bellis 2010, p. 101.
95. CJEU 14 February 1978 (*United Brands v European Commission*), point 65. See also Van Bael & Bellis 2010, p. 101. *Cf. inter alia* cases: CJEU 21 February 1973 (*Continental Can v European Commission)*; CJEU 16 December 1975 (*Suiker Unie v European Commission*); Commission Decision of 17 December 1975 (*Chiquita*); Commission Decision of 4 July 2007 (*Wanadoo v Telefónica*).
96. CJEU 13 February 1979 (*Hoffmann La Roche v European Commission*), point 91. See also Van Bael & Bellis 2010, p. 798.
97. CJEU 13 February 1979 (*Hoffmann La Roche v European Commission*), point 91.
98. Van Bael & Bellis 2010, p. 798.
99. Eg. CJEU 3 July 1991 (*Akzo v European Commission*). See more information Van Bael & Bellis 2010, p. 806 et seq.
100. Eg. Commission Decision of 24 May 2004, COMP/C-3/37.792 (*Microsoft – Windows Media Player*).
101. Eg. CJEU 14 February 1978 (*United Brands*), point 207.
102. Eg. CJEU 26 November 1998 (*Bronner/Mediaprint*).
103. Van de Gronden & De Vries 2006, p. 34.

tion in the EU or a substantial part of it.[104] Therefore, special rules have been implemented.

Regulation No 139/2004 applies to concentrations with a European dimension. According to Article 1 of Regulation No 139/2004, an EU-wide dimension exists if certain turnover thresholds are met.

Whether the European Commission considers a concentration incompatible with the internal market depends on the question whether effective competition will be significantly impeded. Furthermore, the efficiency defense is reinforced by the fact that Merger Regulation No 139/2004 explicitly refers to efficiencies in recital 29, which together with Article 2(1)(b) stipulates that technical and economic progress may be taken into account in assessing mergers.[105]

2.3.3 Enforcement by the European Commission

The European Commission is independent of the Member States. Its job is to represent and uphold the interests of the EU as a whole. It drafts proposals for new European laws, which it presents to the European Parliament and the Council.[106] It is also the EU's executive arm.[107] This means it manages the day-to-day business of the EU, implementing its policies, running its programmes, and spending its funds.[108] The European Commission also acts as the "guardian of the Treaties".[109] The European Commission, together with the CJEU, is responsible for making sure EU law is properly applied by and in all Member States.[110] If the European Commission finds that a Member State is not applying EU law, and therefore is not meeting its legal obligations, the European Commission takes steps to rectify the situation. In such cases, the European Commission can launch an "infringement procedure". In practice, this means sending an official letter stating why the European Commission considers the country to be infringing EU law and setting a deadline for sending the European Commission a detailed reply.[111] If this procedure has no effect on the infringement, the European Commission refers the case to the CJEU, which has the power to impose penalties.[112] The CJEU's decisions are binding on the Member States and on EU institutions.[113]

The European Commission is empowered to actively enforce the competition law rules stated under Article 101 and Article 102 of the TFEU and the rules regarding

104. Regulation No 139/2004, Article 2. See also Van Bael & Bellis 2010, Chapter 7; Van de Gronden & De Vries 2006, p. 35 et seq.
105. Van de Gronden & De Vries 2006, p. 35.
106. https://europa.eu/european-union/about-eu/institutions-bodies_en.
107. Ibid.
108. Ibid. See also Bellamy & Child 2013, paras 1.046-1.048.
109. https://europa.eu/european-union/about-eu/institutions-bodies_en; Van Bael & Bellis 2010, p. 1 et seq.
110. Ibid.
111. See e.g. Regulation No 2015/1589 (successor of Regulation No 659/1999), Article 6 concerning State Aid. See also Bellamy & Child 2013, para 17.087 et seq.
112. https://europa.eu/european-union/about-eu/institutions-bodies_en.
113. Ibid.

merger control.[114] The European Commission has a package of enforcement tools to effectively enforce competition law. These tools are provided to a large extent in Regulation No 139/2004 and Regulation No 1/2003.

The European Commission enjoys a number of investigation tools (e.g. inspection of business and non-business premises and written requests for information).[115] The European Commission may also impose fines on undertakings violating EU antitrust rules. Fines can run up to 10 percent of an undertaking's turnover.[116] It also examines whether a concentration significantly hinders effective competition in the EU. If it does not, the concentration is approved unconditionally. If it does — and no sufficient commitments aimed at removing the impediment are proposed by the merging firms — the concentration is prohibited by the European Commission.[117]

2.3.4 **Present Leniency Policy**

Regulation No 1/2003 is based on a parallel jurisdiction system in which national competition authorities are, alongside the European Commission, active enforcers of Article 101 and Article 102 of the TFEU.[118] The European Commission is entitled to act only if the cartel has an effect on the internal market (between Member States).

As a consequence of the parallel jurisdiction system, several leniency programmes may apply simultaneously and the applicant may have to file applications to more than one authority.[119] This means that if a cartel affects the internal market, an undertaking may wish to request leniency from the European Commission as well as from an impacted Member State where a leniency programme is effective.

The European Commission's leniency policy offers undertakings involved in a cartel either total immunity from or a reduction in the fine that the European Commission would have otherwise applied under Article 101 of the TFEU.[120] It must be noted that the immunity or reduction of the fine only relates to the administrative fine. Leniency does not, however, extend to providing protection from criminal sanctions and only partially removes civil liability.[121] The leniency policy cannot be applied to fines that can be imposed on the basis of other material or formal infringements (e.g. not cooperating, providing wrong information or not filing a concentration in due time).

114. Van Bael & Bellis 2010, p. 1 et seq. and p. 643 et seq.
115. Regulation No 1/2003, *inter alia* Articles 18, 20, and 21. More info Bellamy & Child 2013, para 13.011 et seq.
116. Regulation No 1/2003, Article 23 and Regulation No 139/2004, Article 14. See more information Braat & Van Gelder 2009, para 2.2.
117. European Commission 2008 (Notice on remedies).
118. Regulation No 1/2003.
119. European Competition Network 2006, point 1 et seq.
120. Wils 2016.
121. Antitrust Damages Directive, Article 11.

The leniency policy is not laid down as hard law in statutory provisions. Policy rules implement the policy. Although these rules are not statutorily enshrined, a party acting in compliance with the leniency policy can be assured that the policy rules will be upheld on the basis of the principle of sound administration.[122]

To obtain total immunity, a cartel participant must be the first participant to inform the European Commission of the cartel. Undertakings not qualifying for immunity may benefit from a reduction in fines if they provide evidence that represents significant added value to the information already in the possession of the European Commission.

2.3.4.1 *Immunity from Fines*

The European Commission grants immunity to an undertaking if it is the first to submit information and evidence which in the view of the European Commission will enable to (i) carry out a target inspection in connection with the alleged cartel or (ii) find an infringement of Article 101 of the TFEU in connection with the alleged cartel.[123]

i. Can the European Commission carry out a targeted inspection in connection with the alleged cartel?

This assessment is carried out "ex ante", i.e. without taking into account whether or not a given inspection has been successful and whether or not an inspection has been carried out. The assessment is made exclusively on the basis of the type and quality of the information submitted by the applicant. The undertaking needs to provide a written or oral corporate statement and other information relating to the cartel.

The corporate statement includes the following: (i) a detailed description of the alleged cartel arrangement; (ii) the name and address of the legal entity submitting the immunity application as well as the names of the other undertakings that have participated in the alleged cartel; (iii) the names, positions, office locations and, where necessary, home addresses of all individuals who are or have been involved in the alleged cartel; (iv) information on which other competition authorities have been or will be approached in relation to the alleged cartel.[124]

Immunity is not granted if, at the time of the submission, the European Commission is already in possession of sufficient evidence to take a decision to carry out an inspection or has already carried out such an inspection.

ii. Can the European Commission find an infringement of Article 101 of the TFEU in connection with the alleged cartel?

122. E.g. principle of legitimate expectations.
123. European Commission 2006 (Notice on immunity of fines and reduction fines), points 8 and 9.
124. See for more information Section 2.3.4.3.

In the alternative, immunity is granted on the condition that the European Commission does not have, at the time of the submission, sufficient evidence to find an infringement of Article 101 of the TFEU and that no undertaking has been granted conditional immunity from fines in connection with the alleged cartel.

In addition, several other conditions must in any case be met to qualify for immunity from a fine.[125] First, to qualify for immunity, the undertaking must fully cooperate continuously and expeditiously from the time it submits its application throughout the European Commission's administrative procedure. This requires the applicant to provide accurate, straightforward, and complete information. Second, the undertaking must end its involvement in the alleged cartel immediately following its application, except for what would, in the European Commission's view, be reasonably necessary to preserve the integrity of the inspections. Third, the undertaking must not destroy, falsify, or conceal evidence of the alleged cartel. Nor should the undertaking disclose the content of its contemplated application, except to other competition authorities.

An undertaking that takes steps to coerce other undertakings to join or to remain in the cartel is not eligible for immunity from fines, but it may still be eligible for a reduction in the fines if it fulfills the relevant requirements.[126]

Once the European Commission has received the information and evidence submitted by the undertaking and all the conditions are met as appropriate, the European Commission grants the undertaking a written conditional immunity from fines.[127]

If it becomes apparent that immunity is not available or the undertaking failed to meet the conditions as appropriate, the European Commission notifies the undertaking in writing. In this event, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or ask the European Commission to consider the immunity application as an application for a reduction in the fine.[128]

If two or more applications are submitted for the same alleged infringement, the European Commission starts with the first application received. It does not consider other applications for immunity until it has taken a position on the existing application, irrespective of whether the immunity application is presented formally or as a request for a marker.[129]

2.3.4.2 *Reduction of a Fine*

An undertaking disclosing its participation in an alleged cartel but not meeting the conditions for immunity from a fine may be eligible to a reduction in any fine that would otherwise have been imposed.[130]

125. European Commission 2006 (Notice on immunity of fines and reduction fines), point 9 et seq.
126. Ibid, points 13 and 22.
127. Ibid, point 18.
128. Ibid, point 20.
129. Ibid, point 21.
130. Ibid, point 23.

To qualify, an undertaking must provide the European Commission with evidence of the alleged infringement. This evidence must add significant value to the evidence already in the European Commission's possession. "Significant added value" refers to the extent to which the evidence provided strengthens, by its very nature, its level of detail, or both, the European Commission's ability to prove the alleged cartel.[131] Moreover, the undertaking must meet the following conditions:

i. The undertaking fully, continuously and expeditiously cooperates from the time it submits its application throughout the European Commission's administrative procedure. In particular, the applicant provides accurate, straightforward, and complete information;
ii. The undertaking ends its involvement in the alleged cartel immediately following its application, except for what would, in the European Commission's view, be reasonably necessary to preserve the integrity of the inspections;
iii. The undertaking does not destroy, falsify or conceal evidence of the alleged cartel. Nor does it disclose the fact or the content of its contemplated application, except to other competition authorities.[132]

At the end of the administrative procedure, the European Commission will determine the level of reduction in the fine that would otherwise have been imposed on the undertaking.

i. The first undertaking to provide significant added value is granted a reduction of 30 — 50 percent (*Band 1*).
ii. The second undertaking to provide significant added value is granted a reduction of 20 — 30 percent (*Band 2*).
iii. Subsequent undertakings providing significant added value are granted a reduction of up to 20 percent (*Band 3*).[133]

If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application and any subsequent evidence submissions, this acknowledgment confirming the date and, if appropriate, the time of each submission. The European Commission does not take any position on an application for a fine reduction until it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.[134]

If the European Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value and that the undertaking has met the conditions, it will inform the undertaking in writing of its intention to apply a fine reduction within a specific band. The European Commission also informs the undertaking in writing whether it has come to the preliminary conclusion that the undertaking does not qualify for a fine reduction. The

131. European Commission 2006 (Notice on immunity of fines and reduction fines), point 25.
132. Ibid, point 24 in conjunction with point 12.
133. Ibid, point 26.
134. Ibid, point 28.

European Commission may disregard any application for a fine reduction if the application is submitted after the statement of objections is issued.[135]

At the end of the administrative procedure, the European Commission evaluates the final position of each undertaking filing an application for a fine reduction. The European Commission determines the following in any such final decision:[136] (i) whether the evidence provided by an undertaking represents significant added value with respect to the evidence in the European Commission's possession at the same time; (ii) whether the conditions shown above are met; and (iii) the exact level of reduction within the bands.

2.3.4.3 *Corporate Statement*

A corporate statement / leniency statement made under the "European Commission Notice on immunity from and reduction of fines in cartel cases" is a voluntary statement (made to the European Commission by or on behalf of an undertaking) of the undertaking's knowledge of a cartel and its role in the cartel, this statement being prepared especially to be submitted under the European Commission Notice. Any statement made to the European Commission in the administrative procedure in relation to this notice forms part of the European Commission's file and can thus be used in evidence.[137]

One of the revisions in the 2006 Leniency Notice was the introduction of a procedure to protect corporate statements from being made available to claimants in civil proceedings for damages.[138] The European Commission could, at the applicant's request, allow corporate statements to be provided orally, unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements are recorded and transcribed at the European Commission's premises. Undertakings making oral corporate statements are granted the opportunity to check the technical accuracy and correct the substance of the recording within a given time limit at the European Commission's premises. Following the explicit or implicit approval of the oral statements or the submission of any corrections to it, the undertaking listens to the recordings at the European Commission's premises and checks the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment.[139]

According to the European Commission notice on immunity from and reduction of fines in cartel cases, access to corporate statements is only granted to the addressees of a statement of objection. Other parties cannot access corporate statements. The European Commission's position is that this specific protection of a corporate

135. European Commission 2006 (Notice on immunity of fines and redaction fines), point 29.
136. Ibid, point 30.
137. Ibid, point 31.
138. Demetriou & Gray 2007, pp. 1434-1435.
139. European Commission 2006 (Notice on immunity of fines and reduction fines), point 32.

statement is no longer justified if the applicant discloses its contents to third parties.[140]

Access to the file is granted only on the condition that the information thereby obtained be used for the purpose of judicial or administrative proceedings for the application of the EU competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceedings could be regarded as lack of cooperation. Furthermore, if any such use is made after the European Commission has already made a prohibition decision in the proceeding, the European Commission may, in any legal proceedings before the European courts, ask the court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of outside counsel, the European Commission could report the incident to that counsel's bar, with a view to disciplinary action.[141]

Corporate statements are transmitted to the competition authorities of the Member States[142] only if the conditions set out in the Network Notice[143] are met and the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the European Commission.[144]

2.3.4.4 *Marker Protection*

The "marker", introduced in 2006, as new phenomenon was welcomed by most people involved in the field of competition law.[145] Under the leniency programme of the European Commission, the marker is only available for the immunity applicant and not for the other cartelists that apply for a reduction of the fine afterwards. Providing a marker to the other leniency applicants applying for a reduction would make it too complicated, according to the European Commission.[146]

The European Commission uses the marker system to "protect" a leniency applicant. The marker secures the immunity applicant's place in the queue while it is gathering the information needed to apply for leniency successfully. The information later provided is deemed to have been submitted on the date of the marker. A marker is a brief notice to the competition authority in which the leniency applicant describes basic information about the illegal cartel, such as the parties and products involved, the territory, the duration, and the nature. Afterwards, the information provided is supplemented with additional information about the cartel.

The idea of the marker is to reduce paperwork at the start of the leniency process. It should be easier for the undertaking to apply for leniency and hence more attrac-

140. European Commission 2006 (Notice on immunity of fines and reduction fines), point 33.
141. Ibid, point 34.
142. Pursuant to Regulation No 1/2003, Article 12.
143. European Commission 2004 (Notice on Cooperation within the NCA).
144. European Commission 2006 (Notice on immunity of fines and reduction fines), point 35.
145. See *inter alia* Allen & Overy 2006, p. 1; ABA 2006, pp. 1, 9 et seq.; Ashurts 2006, para 4; Baker & McKenzie LLP 2006, para 2.4; Clifford Chance 2006, p. 5.
146. See *inter alia* Van de Gronden 2017, p. 343.

tive for an undertaking to apply for leniency. Accordingly, the purpose of a marker system is to encourage a race among cartel members to report cartels to the cartel authority.[147]

One important point is that the European Commission's power to grant a marker is discretionary. In other words, the European Commission *may* grant a marker.[148] This uncertainty might reduce the marker system's attractiveness to undertakings that intend disclosing their cartels.[149] Be this as it may, the marker system does offer an undertaking the possibility of winning the race even if it does not have all the information required when deciding whether to make a dash for immunity.[150]

2.3.4.5 *Disclosure of Leniency Information*

The confidentiality of information provided by an applicant for leniency is considered to be important. Whistle blowers often do not like to have too much attention paid to their deed of informing a competition authority of a cartel. An even more important reason is that an applicant for leniency does not want the information provided to be used against it by other authorities or in civil proceedings. Uncertainty about whether the information provided by an applicant for leniency will remain confidential could remove the incentive to apply for leniency.[151] Economist Motchenkova even states that if a leniency procedure is more confidential, cartelization is less likely to occur.[152] If a leniency request is not treated confidentially, a leniency policy may even lead to prolonging a cartel's existence.[153]

Inspection on the file of the European Commission is governed by EU law.

Regulation 1/2003
By virtue of Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to the documents of the Union's institutions, bodies, offices and agencies, subject to the principles and conditions to be defined in accordance with Article 15(3) TFEU.[154] Pursuant to Article 27 (2) of Regulation 1/2003 and Article 15 of Regulation 773/2004 the rights of access to the file are reserved to the parties involved in the case of the European Commission.[155] Victims of competition law infringements are regularly not party to the European Commission's procedure.[156] As a third party, they can not rely on these access to the file provisions.

147. ABA 2006, p. 2.
148. European Commission 2006 (Notice on immunity of fines and reduction fines), point 15.
149. Incardona 2007, p. I-40.
150. Ibid.
151. European Commission 2017 (Proposal Enforcement Directive), point 45 et seq.; Billiet 2009, p. 21; ABA 2006, p. 1.
152. Motchenkova 2005, Chapter 5.
153. Ibid.
154. EGC 28 March 2017 (*Deutsche Telekom v Commission*), point 22.
155. Ibid, point 32 et seq.
156. Ruster 2017, p. 139.

Regulation 1049/2001

Of greater (but still limited) importance is the right of everyone to access documents in accordance with Article 2 (1) of the Access to Documents Regulation.[157] The European Commission could be forced to provide documents to third parties under the Access to Documents Regulation. Under this Access to Documents Regulation, the European Commission may be obliged to provide information to EU citizens and every natural person and legal entity with a place of residence or corporate domicile in one of the Member States.[158] However, Article 4 of the Access to Documents Regulation sets limits for this information policy. Based on Article 4, the European Commission refuses access to documents where disclosure would *inter alia* undermine the commercial interests of a natural or legal person, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. Haasbeek concluded that it will be very difficult for plaintiffs in civil proceedings to receive documents from the European Commission, as the exceptions incorporated in the Access to Documents Regulation will often bar access to competition files.[159]

In a 2011 German case on German disclosure rules, the ECJ considered whether leniency information had to be provided by the German competition authority. The outcome of this case also influenced the issue of the information that the European Commission has to disclose, because the discussion was basically about how Article 101 of the TFEU should be applied.

A purchaser of decor paper and the victim of a decor paper cartel, Pfleiderer AG ("Pfleiderer"), applied to the German competition authority (the BKartA) for comprehensive access to the files relating to the cartel proceedings in order to prepare for civil proceedings for a damages award. The BKartA partially refused Pfleiderer's request. Pfleiderer appealed against the decision to the local civil court in Bonn. The court made clear that the BKartA was obliged to provide Pfleiderer with the information requested, including the information concerning the leniency request. However, as the court was of the opinion that the intended decision possibly conflicted with European competition law rules, the court decided to adjourn the proceedings and refer the question to the ECJ.[160]

In the case referred by the German court to the ECJ, Advocate General Mazák gave his opinion on whether leniency information in the possession of the BKartA had to be disclosed to a third party for the purpose of preparing an action for damages.[161] Mazák concluded that, if a national competition authority is operating a leniency programme, a third party adversely affected by the cartel does not have access to self-incriminating statements voluntarily provided by leniency applicants. Self-in-

157. Regulation No 1049/2001. For a number of years, similar national regulations have existed and may be applicable for (national) cartel authorities.
158. Regulation No 1049/2001, Article 2(1).
159. Haasbeek 2009, pp. 137-147. *Cf.* Ruster 2017, p. 141; Amador Sanchez, Dijkman, Lamboo & Smits 2008, p. 38; Eilmansberger 2007, *inter alia* p. 477.
160. AG Bonn 4 August 2009, 51 Gs 53/09.
161. See opinion of Advocate General Mazák of 16 December 2010 in Case C-360/09 (*Pfleiderer AG v BKartA)*.

criminating statements are those in which the leniency applicant effectively admits and describes its participation in the infringement. Allowing access to such statements could substantially reduce the effectiveness of the relevant leniency programme and undermine the national authority's enforcement of Article 101 of the TFEU. At the same time, Mazák argued that it would infringe the fundamental rights to an effective remedy and a fair trial for a national competition authority to deny access to other pre-existing documents submitted by a leniency applicant that would assist a third party to establish the existence of the cartel, the damage caused, and a causal link between the breach of competition law and the damage suffered by the third party.

On 14 June 2011, the ECJ answered the question of the German court.[162] It stated that, in the absence of binding EU law on the subject, it was up to the Member States to establish and apply national rules on the right of persons adversely affected by a cartel to have access to documents relating to leniency procedures. However, the Member States had to ensure that the rules established or applied did not jeopardize the effective application of Article 101 and Article 102 of the TFEU.

As concluded by the European Commission and the Member States that have submitted observations, the ECJ has held that leniency programmes are useful tools for uncovering and bringing an end to infringements of competition rules and, therefore, serve the objective of the effective application of Article 101 and Article 102 of the TFEU.[163] The effectiveness of those programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed.[164] According to the ECJ, the view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, under Article 11 and Article 12 of Regulation No 1/2003, the European Commission and the national competition authorities might exchange information that the person has voluntarily provided.[165]

Nevertheless, the ECJ has made clear that it is settled case-law that any individual has the right to claim damages for loss caused by conduct liable to restrict or distort competition.[166] The existence of such a right strengthens the working of EU competition rules and discourages agreements or practices (frequently covert) liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective

162. ECJ 14 June 2011 (*Pfleiderer AG v BKartA*).
163. Ibid, point 25.
164. Ibid, point 26 et seq.
165. Ibid, point 27.
166. ECJ 20 September 2001 (*Courage Ltd v Bernard Crehan*), points 24 and 26 and ECJ 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), points 59 and 61.

competition in the European Union.[167] Accordingly, it is necessary to ensure that the rules do not operate in such a way as to make it practically impossible or excessively difficult to obtain compensation for cartel infringements and to weigh the respective interests in favor of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency.[168] That reasoning may be adopted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.[169]

In the light of the above, the ECJ answered the question referred to it by the court in Bonn by stating that the provisions of EU law on cartels must be interpreted as not precluding a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.[170] It is, however, for the courts and tribunals of the Member States, on the basis of their national laws and by weighing the interests protected by EU law, to determine the conditions under which this access is permitted or refused.[171]

In the later case of *Bundeswettbewerbsbehörde v Donau Chemie et al.*, the ECJ issued a reminder that, regarding the detailed procedural rules governing actions for damages arising from competition infringements, it is for the Member States to establish and apply national rules on the right of access.[172] Nonetheless, Member States must exercise that competence in accordance with EU law.[173] The rules applicable to actions for safeguarding rights that individuals derive from the direct effect of EU law must not be less favorable than those governing similar domestic actions and must, in practice, not make it impossible or excessively difficult to exercise rights conferred by EU law.[174]

In this case, the issue was whether an absolute ban on victims receiving documents violates EU legislation if the parties involved in the litigation do not consent to providing the information. The ECJ, referring to the case of *Bundeskartellamt v Pfleiderer,* made clear that the national courts must weigh the interests of disclosing the information and those of protecting the information.[175] The ECJ noted that the balancing was necessary because, in competition law in particular, a rigid rule — either because it provides for the absolute refusal to grant access to the documents in question or because it grants access to those documents as matter of course — is liable to undermine the effective application, *inter alia*, of Article 101 of the TFEU and the rights conferred by that provision on individuals.[176] Consequently, the

167. ECJ 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 24 et seq. ECJ 14 June 2011 (*Pfleiderer AG v BKartA*), point 28.
168. ECJ 14 June 2011 (*Pfleiderer AG v BKartA*), points 30-32.
169. Ibid.
170. Ibid.
171. Ibid.
172. ECJ 6 June 2013 (*Bundeswettbewerbsbehörde v Donau Chemie et al.*), point 26.
173. Ibid, point 27.
174. Ibid.
175. Ibid, point 30.
176. Ibid, point 31.

weighing of interests justifies the disclosure of information or the protection of that information by the national courts only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.[177]

In another case the EGC and later on the CJEU were asked to determine whether the European Commission was allowed to refuse a request for disclosure of documents from the file to a third party. EnBW Energy Baden-Württemberg ("EnBW") claimed to have been affected by the gas insulated switchgear cartel ("GIS cartel").[178] EnBW requested access to documents relating to proceedings in the GIS cartel and held by the European Commission.[179] The European Commission refused to provide the information referring to exceptions of Article 4 of the Access to Documents Regulation.[180]

The CJEU accepted a general presumption that documents relating to a proceeding under Article 101 of the TFEU fall under the disclosure exception of Article 4 of the Access to Documents Regulation.[181] However, the CJEU also noted that the general presumption does not rule out the possibility of demonstrating that the request of a specific document disclosure is not covered by that presumption, or that there is an overriding public interest in disclosure of the document by virtue of Article 4 of the Access to Documents Regulation.[182]

The CJEU reminded that any person is entitled to claim compensation for the loss caused to that person by a breach of Article 101 of the TFEU.[183] Such a right strengthens the working of the EU competition rules, thereby making a significant contribution to the maintenance of effective competition in the EU.[184] To ensure effective protection of the right to compensation enjoyed by a claimant, the CJEU however, saw no need for every document relating to a proceeding under Article 101 of the TFEU to be disclosed to the claimant on the ground that that party intends to bring an action for damages.[185] This is because it was highly unlikely that the action for damages would need to be based on all the evidence in the file relating to that proceeding.[186] In the absence of any such necessity, the interest in obtaining compensation for the loss suffered as a result of a breach of Article 101 of the TFEU cannot constitute an overriding public interest, within the meaning of Article 4(2) of the Access to Documents Regulation.[187]

The CJEU held that any person seeking compensation for the loss caused by a violation of Article 101 of the TFEU must demonstrate that it is necessary for that

177. ECJ 6 June 2013 (*Bundeswettbewerbsbehörde v Donau Chemie et al.*), point 34.
178. EGC 22 May 2012 (*EnBW Energie Baden-Württemberg AG v European Commission*); CJEU 27 February 2014 (*Commission v EnBW Energie Baden-Württemberg AG*).
179. EGC 22 May 2012 (*EnBW Energie Baden-Württemberg AG v European Commission*).
180. Regulation No 1049/2001, Article 4(2).
181. CJEU 27 February 2014 (*Commission v EnBW Energie Baden-Württemberg AG*), point 93 et seq.
182. Ibid, point 100 et seq.
183. Ibid, point 104 et seq.
184. Ibid.
185. Ibid, point 106.
186. Ibid, point 107 et seq.
187. Ibid.

person to be granted access to documents in the European Commission's file to be able to weigh, on a case-by-case basis, the respective interests in favor of disclosure or protection of those documents, taking into account all the relevant factors in the case. In the absence of any such necessity, the interest in obtaining compensation for the loss suffered as a result of a breach of Article 101 of the TFEU cannot constitute an overriding public interest within the meaning of Article 4(2) of the Access to Documents Regulation.[188]

In the recent case *Evonik Degussa*, the CJEU decided on the non-confidential version of a decision by the European Commission. A cartelist complained about the non-confidential version of the decision the European Commission wanted to make public. That decision was comprised of verbatim quotations, and conveyed information from the document the undertaking provided to the European Commission in support of a corporate statement in order to obtain leniency.

The CJEU pointed out that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself.[189] Whereas the first type of publication should be authorized, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted under any circumstances.[190]

Intermediate Conclusion

Based on this legal framework, statements and documents submitted to the European Commission in the context of a leniency application are often protected against disclosure to third parties, including victims of cartel infringements.[191] In practice, the European Commission regularly rejects requests for access to leniency documents.[192] It could be argued that the *Evonik Degussa* case suggests that the statement itself is protected from disclosure per se. That would be in line with the protection of the disclosure provision provided by the Antitrust Damages Directive. However, it is questionable whether leniency documents are in each and every situation protected from disclosure. There might be situations in which the case-by-case analysis — as stated in the *Pfleiderer* case, the *Donau Chemie* case and the *EnBW* case — make it necessary to disclose leniency documents, also the corporate statement.[193]

It is significant to note that information could also have been obtained via civil courts based on national disclosure and discovery rules.[194] This applies in particular to the right of discovery in the common-law countries, like the United States (see

188. CJEU 27 February 2014 (*Commission v EnBW Energie Baden-Württemberg AG*), point 107 et seq.
189. CJEU 14 March 2017 (*Evonik Degussa v Commission*), point 87.
190. Ibid, point 87. *Cf.* CJEU 26 July 2017 (*AGC Glass Europe v Commission*).
191. See more info Vandenborre, Goetz & Kafetzopoulos 2017, p. 2.
192. See *inter alia* Ruster 2017, p. 139. *Cf.* Van Bael & Bellis 2010, p. 1138.
193. Ruster 2017, p. 167.
194. See *inter alia* Ruster 2017, pp. 143-184.

Chapter 5), the United Kingdom and Ireland. However, in countries like Germany and the Netherlands, there are other opportunities to collect information that may potentially have the consequence that information has to be provided.[195] That is certainly the case with the arrival of the new disclosure provisions in the Antitrust Damages Directive (see further in Chapter 4).

2.3.5 European Commission's Leniency Policy Practice

Between 2005 and 2010, the European Commission fined undertakings involved in approximately 35 different cartel cases.[196] In 33 of these cases (approximately 95%), the leniency programme played a role. Furthermore, it has become clear that full immunity is often granted.[197] In 77 percent of the cartel cases, an applicant was granted a 100 percent reduction of the fine. The cartel case of *Hard haberdashery: fasteners*[198] was still under the 1996 leniency regime, so a reduction of only 75 percent was provided in that case. In certain other cases, mainly in 2007 and 2008, leniency apparently played a "less" important role because the European Commission started some investigations on its own initiative.[199]

As stated above in Section 2.3.4.1, 100 percent immunity is provided if the applicant is the first to provide information concerning a cartel that makes it possible for the European Commission to start an investigation. The other way to get a 100 percent reduction in the fine is for the applicant to make it possible for the European Commission to find the existence of the cartel.

From the above, it seems that in almost 80 percent of the cartel cases handled by the European Commission without the help of at least one of the cartel infringers, the European Commission would not be aware of the cartel's existence or the European Commission would not be able to find the existence of the cartel.[200] This is relatively consistent with the conclusions of Mr. Fonteijn, head of the ACM, who stated that 75 percent of the European Commission's cartel cases result from a leniency application.[201] It means that without the leniency applications, most cartels would not have been uncovered and cartel infringers would not be fined. It proves the importance of a well-functioning leniency programme for the enforcement of European competition law.

The European Commission's leniency policy is not implemented in rules of law that the administration is always bound to comply with.[202] Nevertheless, the admi-

195. Billiet 2009, pp. 16-17; Immenga & Mestmäcker 2007, nr. 268; European Competition Lawyers Forum 2006.
196. http://ec.europa.eu/competition/cartels/cases/cases.html.
197. See *inter alia* Wils 2016.
198. Commission Decision of 19 September 2007, COMP/E-1/39.168 (*PO/Hard haberdashery: Fasteners*).
199. Commission Decision of 11 March 2008, COMP/38.543 (*International removal services*); Commission Decision of 23 January 2008, COMP/38.628 (*Synthetic Rubber*); Commission decision of 28 November 2007, COMP/19.165 (*Flat glass*); and Commission Decision 20 November 2007, COMP/ 38.432 (*Professional videotapes*).
200. *Cf.* Wils 2016, p. 334.
201. Fonteijn 2014.
202. On 3 August 2015, the European Commission adopted amendments to Regulation No 773/2004 and four related Notices.

nistration may not depart from rules of practice in an individual case without giving reasons compatible with the principle of equal treatment.[203] In adopting and publishing these rules of conduct, the European Commission sets a limit on the exercise of its discretion and cannot depart from those rules without the risk of being found, where appropriate, to be in breach of general principles of law, such as the principle of equality and the protection of legitimate expectation.[204] However, policy rules lack democratic oversight and are often less clear, less predictable and less transparent than rules laid down in hard law.[205]

Nevertheless, both the EGC and the CJEU have accepted that the European Commission has a discretion to set fines for a breach of competition or, if deemed appropriate, to grant leniency.[206]

More specifically, the CJEU has confirmed that the European Commission has a wide discretion to impose fines and to determine the level of the fines, taking into consideration the gravity and duration of the infringement concerned.[207] The discretion of the European Commission is limited by the legal maximum of 10 percent of the overall turnover of the undertaking concerned as set forth in Article 23 of Regulation No 1/2003.

In addition, the CJEU has clarified that, with regard to the grant of leniency, the European Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.[208] It must be borne in mind that the reduction of the fines is justified only if the cooperation of undertakings participating in the unlawful conduct facilitates the European Commission in establishing the infringement and, where possible, to end it.[209] Taking into consideration the rationale behind the reduction, the European Commission cannot disregard the usefulness of the information provided, as it is a necessary part of the evidence already in its possession. The CJEU has pointed out that the discretion of the European Commission should find its limits in a coherent and non-discriminatory policy.

In the case of *Le Carbone-Lorraine* the EGC stated that the European Commission should — in exercising its wide discretionary power to set fines —take numerous factors into account, including the cooperation of the undertakings concerned

203. *Cf.* EGC 8 October 2008 (*Le Carbone-Lorraine v European Commission*), point 70; EGC of 18 June 2008 (*Hoechst GmbH v European Commission*), point 510 et seq.
204. *Cf.* EGC 8 October 2008 (*Le Carbone-Lorraine v European Commission*), point 71.
205. *Cf.* Appeldoorn & Vedder 2013, p. 88.
206. EGC 8 October 2008 (*Le Carbone-Lorraine v European Commission*), point 276 et seq.; EGC 14 May 1998 (*BPB de Eendracht NV v European Commission*), point 325; EGC 14 May 1998 (*Finnish Board Mills Association - Finnboard v European Commission*), point 363; EGC 14 May 1998 (*Mayr-Melnhof Kartongesellschaft mbH v European Commission*), point 330; See also Conclusion AG L.A. Geelhoed of 19 January 2006, CJEU 29 June 2006 (*European Commission v SGL Carbon AG*).
207. *Cf.* CJEU 28 June 2005 (*Dansk Rørindustri A/S and Others v. European Commission*), point 172.
208. CJEU 10 May 2007 (*SGL Carbon AG v European Commission*), point 88.
209. CJEU 28 June 2005 (*Dansk Rørindustri A/S and Others v European Commission*), point 399; EGC 14 May 1998 (*BPB de Eendracht NV v European Commission*), point 325; EGC 14 May 1998 (*Finnish Board Mills Association - Finnboard v European Commission*), point 363.

during the investigation. In this context, the European Commission is required to make complex assessments of fact, such as the facts relating to the cooperation provided by the individual undertakings concerned.[210]

Indeed, the wide discretionary power of the European Commission is not unlimited. It should take into consideration multiple factors, such as the duration and the gravity of the infringement and the extent of cooperation provided.[211] With regard to the latter, the European Commission has an additional discretion in assessing the quality and usefulness of the information and cooperation provided. The degree of cooperation will be measured in reference to the contribution made by other undertakings. Furthermore, the discretionary power is restricted by the objectives set forth in the competition rules, regulating the scope of the penalization of a cartel.

2.3.6 Evaluation of the European Commission's Leniency Policy

Over the years, the cost-benefit analysis has become more beneficial for the leniency applicant. There are greater benefits for a leniency applicant, for example, the introduction of a 100 percent reduction of the fine. The European Commission also seems aware of the fact that for the leniency policy to be effective it is important that it should be drawn up and carried out in a clear, transparent, predictable and equal way.[212] This line of thinking and way of acting certainly have a positive influence on the effectiveness of the European Commission's leniency policy. This becomes clear from the fact that amendments to its leniency policy in 2002 led to many more leniency applications. Another positive aspect of the European Commission's leniency policy can be found in the structuring of the reduction of fines. The European Commission set "bands" that make it transparent and obvious to undertakings what possible reduction in the fines would be provided as the result of a leniency application.

Despite the positive aspects of setting up a clear, predictable, transparent and non-discriminatory leniency policy, there appear to be ways to improve the leniency policy to the next level. Separately from the discussion about the various leniency policies within Europe and their harmonization (or the lack thereof) (see Sections 2.6 and 2.7), there are some issues concerning the European Commission's leniency policy that do need attention.

First of all, the European Commission is structured as an all-in-one system, whereby almost no formal or physical distinction between investigating and decision-making services is made. Indirectly, this may have a negative impact on the effectiveness of the leniency policy. There is a risk of undertakings not believing that the policy will be applied and carried out in a clear, predictable, transparent and equal way if there is no separation between the investigators of a cartel and the competition authority decision-makers.

210. EGC 8 October 2008 (*Le Carbone-Lorraine v European Commission*), point 271; CJEU 10 May 2007 (*SGL Carbon AG v European Commission*), point 88.
211. EGC 15 December 2010 (*E.ON Energie AG v European Commission*), point 287.
212. *Cf.* Wils 2016, p. 345.

Second, the leniency policy is written down in policy rules. A clear advantage is that it is easier to change policy rules than legislation. It is a pragmatic approach. However, policy rules come with disadvantages. Making it possible to change policy rules rather quickly also implies uncertainty for the stakeholders. Moreover, policy rules are not subject to democratic oversight.[213] Democratic oversight is found only in the generic legislation setting the level of the fines. Furthermore, the last disadvantage with policy rules is that the court is not bound by policy rules if the court considers that policy rules violate legislation.

Furthermore, although the bands provide more certainty about the reductions in the fines, within the bands there may still be severe differences in the amount of the fine reductions. A reduction of 50 percent is quite different from a reduction of 30 percent, and a reduction of 20 percent is much more than no reduction at all. This too endangers the clarity, transparency, and predictability of the leniency programme.

In addition, the information provided by a leniency applicant seems to be largely protected from disclosure but not completely. Especially self-incriminating statements voluntarily provided by leniency applicants appear protected. However, the question is whether the leniency applicant itself is really protected. The test set for providing leniency documents by the ECJ is that there should be a weighing of the two factors (i.e. the need for a litigation process in which information could be disclosed if it is necessary for a victim of a cartel to claim for damages v. the protection of the leniency programme by keeping information confidential), which should be conducted on a case-by-case bases under national law. This may imply that information, also in relation to the leniency application, will have to be provided. As long as this is not completely clear, this can lead to uncertainty. In addition, practice shows that also from other non-confidential information from the authority, like the decision to set a fine — often published on the internet — claims may be expected, also for leniency applicants. Van Bael and Bellis say that regardless of the measures taken to protect the corporate statement, the final decision of the European Commission will disclose the identity of the leniency applicant and contain a detailed description of the participation in the cartel.[214] Any protection granted is thus short term.[215] In other words, it appears that protecting the leniency information, does not prevent proceedings for damages against the immunity recipient. This will be further discussed in Chapter 4 and Chapter 6.

2.4 German Leniency Policy

2.4.1 Introduction

The German leniency policy is based on the European leniency policy. The first German leniency policy dates from 2000.[216] To provide greater guidance and clarity

213. Appeldoorn & Vedder 2013, p. 88.
214. Van Bael & Bellis 2010, p. 1138.
215. Ibid.
216. Voet van Vormizeele 2006, pp. 292-293.

to immunity applicants, the BKartA revised its leniency policy in 2006.[217] The leniency programme of the BKartA applies to cartel participants (natural persons, undertakings and associations). To some extent, criminal law also plays a role in German competition law. A specific criminal offence, punishable with imprisonment, exists for bid rigging, an offence for which no leniency programme exists.[218]

Section 2.4.2 discusses the role and powers of the BKartA as a competition authority. Section 2.4.3 provides an overview of the German leniency policy rules. Section 2.4.4 discusses and analyzes how the German leniency policy functions in daily practice. Section 2.4.5 provides an evaluation of the German leniency policy.

2.4.2 Enforcement by the BKartA

The BKartA is the competent authority at the German federal level for competition law. According to Article 50(1) of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) ("ARC"), the BKartA is also the competent authority to apply Article 101 and Article 102 of the TFEU, provided that the case at issue does not concern the competence of a non-federal competition authority.[219] The enforcers at a non-federal level will not be discussed here, as their role in the field of competition law is rather limited.

Under Article 51(1) of the ARC, the BKartA is an "independent federal authority" (*selbständige Bundesoberbehörde*) which falls under the authority of the federal Ministry for Economic Affairs and Technology.[220] The independent status of the BKartA implies that the German legislature has defined a policy field (competition) within which the BKartA exercises its own powers. The Minister is not allowed to remove these powers.[221]

One of the tasks of the BKartA and the competition authorities of the German states (*Länder*) is to enforce the ban on cartels. It has been an integral element of Article 1 of the ARC since the ARC came into force in 1958.[222]

Article 1 of the ARC concerns the prohibition of agreements restricting competition. Agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition are prohibited.

The BKartA is entitled to conduct an investigation and to collect evidence.[223] It has jurisdiction to issue prohibition decisions,[224] interim measures,[225] decisions in

217. Voet van Vormizeele 2006, p. 292.
218. Wils 2007, p. 57.
219. Van de Gronden & De Vries 2006, p. 44 et seq.
220. Klaue 2014, GWB § 51, para 1-3.
221. Klaue 2014, GWB § 51, para 1. See also Van de Gronden & De Vries 2006, p. 44.
222. http://www.bundeskartellamt.de. See also Schroeder 2006, p. 445.
223. Van de Gronden & De Vries 2006, p. 46; Van Aaken 2004, p. 82.
224. Article 32 ARC.
225. Article 32a ARC.

which commitments of undertakings are made binding,[226] and decisions in which the inapplicability of competition rules to certain behavior is established.[227] Furthermore, under Article 81 of the ARC, the BKartA has the power to impose fines on undertakings that have violated German and European competition law. These sanctions fall within the scope of administrative law. At present, the amount of the fine for a severe infringement can be up to 10 percent of the undertaking's turnover (Article 82 (4) of the ARC). This is similar to the amount that the European Commission can impose. Moreover, under Article 34 of the ARC, the BKartA is able to order the disgorgement of the economic benefit and require the undertaking to pay a corresponding sum resulting from the violations of German and European competition law.[228] An individual can receive a fine of as much as a million euros.

An essential feature of the BKartA is its decision-making structure.[229] The so-called "Decision divisions" (*Beschlussabteilungen*) are at the heart of the decision-making process in the BKartA.[230] Under Article 51(2) of the ARC, these divisions take competition law decisions on behalf of the BKartA:[231]

> "*Die entscheidungen des Bundeskartellamtes werden von den Beschlussabteilungen getroffen, die nach Bestimmung des Bundesministeriums für Wirtschaft und Technologie gebildet werden. Im überigen regelt der Präsident die Verteilung und den Gang der Geschäfte des Bundeskartellamtes durch eine Geschäftsordnung; sie bedarf der Bestätigung durch das Bundesministerium für Wirtschaft und Technologie.*"

Even the president of the BKartA cannot influence the decisions taken by *Beschlussabteilungen*.[232] The Chairman of a *Beschlussabteilung* is a civil servant appointed for life and is required to be a qualified judge.[233] It can be concluded from this that a significant characteristic of the decision-making process in German competition law is that it has a quasi-judicial structure.[234] It is likely that this system with a guaranteed internal independence contributes to legal certainty and to a leniency policy that could be carried out in a clearer, more predictable, more transparent and more non-discriminatory way.[235]

2.4.3 **Present German Leniency Policy**

As described, the German leniency provisions draw on those of the European Commission.[236] As with the European Commission's policy, the German leniency policy is set out in policy rules.[237] Although these rules are not enshrined by law,

226. Article 32b ARC.
227. Article 32c ARC.
228. Van de Gronden & De Vries 2006, p. 46.
229. Ibid, p. 45.
230. Ibid.
231. Klaue 2014, GWB, §51, para 5.
232. Ibid.
233. Ibid. See Van de Gronden & De Vries 2006, p. 45.
234. *Cf.* Van de Gronden & De Vries 2006, p. 45.
235. Ibid.
236. Henry 2005, p. 17.
237. Voet van Vormizeele 2004, pp. 240-241.

as also discussed above under Sections 2.3.4 and 2.3.5, the BKartA's compliance with the leniency policy can be invoked on the basis of the principles of sound administration by the parties concerned.

Generally speaking, "soft law" is considered more ambiguous. To some extent, the authorities have discretion in interpreting these policy rules and in general there is no democratic oversight. Furthermore, the authorities are not prohibited from changing the rules. There are uncertainties that might influence a party's interest in applying for leniency, as described above in Sections 2.3.4, 2.3.5 and 2.3.6.

As in other European countries, more undertakings in Germany may receive a fine reduction. There is only one undertaking that could receive full immunity.

2.4.3.1 *Immunity from Fines*

The BKartA grants a cartel participant immunity from a fine if the applicant provides the BKartA with the evidence necessary to obtain a search warrant and it is the first participant in a cartel to contact the BKartA before the latter has sufficient evidence to obtain a search warrant. In addition, it provides the BKartA with verbal and written information and, if available, evidence enabling the BKartA to obtain a search warrant. It is important that the applicant was not the only ringleader in the cartel, that it did not coerce others to participate in the cartel[238] and that it cooperates fully and on a continuous basis with the BKartA. [239]

When the BKartA is in a position to obtain a search warrant, it will as a rule grant a participant immunity from a fine if the participant is the first participant in the cartel to contact the BKartA before it has sufficient evidence to prove the offence. It provides the BKartA with verbal and written information and, if available, evidence enabling it to prove the offence. It is important that it was not the only ringleader in the cartel, that it did not coerce others to participate in the cartel, that it cooperates fully and on a continuous basis with the BKartA and that there is no cartel participant that enabled the BKartA to obtain a search warrant already.[240]

2.4.3.2 *Reduction in the Fines*

For the benefit of a cartel participant who does not meet the conditions for immunity, the BKartA can reduce the fine by up to 50 percent if it provides the BKartA with verbal or written information and, if available, evidence making a significant contribution to proving the offence. In addition, the applicant cooperates fully and on a continuous basis with the BKartA.[241]

The amount of the reduction is based on the value of the contribution to uncovering the illegal agreement and the sequence of the applications.

238. Schroeder 2006, pp. 441-442.
239. Bundeskartellamt 2006, point 3.
240. Ibid, point 4.
241. Ibid, point 5.

2.4.3.3 *Marker Protection*

A cartel participant may contact the head of the Special Unit for Combating Cartels or the chairman of the competent Decision Division to declare the cartel participant's willingness to cooperate. The timing of the placement of this marker is decisive in determining the status of the application.[242]

The marker is not only reserved for the first immunity applicant. The German system also allows markers for subsequent applicants for fine reductions (so called "type 2 markers").

The BKartA immediately confirms to the applicant in writing that a marker has been placed and/or that the application has been received, stating the date and time of receipt.[243]

A marker may be placed orally or in writing. If placed orally in English, a German translation must be provided in writing. It must contain details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved and at which other competition authorities the applications have been or are intended to be filed.[244]

After the marker has been placed, the BKartA sets a time limit of a maximum of eight weeks for the drafting of an application for leniency.[245]

In its application, an applicant must submit information necessary for obtaining a search warrant or for proving the offence.[246] If the applicant does not fulfill its obligations, its priority status lapses, and the subsequent applicants move up in rank.[247]

2.4.3.4 *Disclosure of Leniency Information*

Within the scope of its statutory limits and the regulations on the exchange of information with foreign competition authorities, the BKartA treats the identity of an applicant as confidential and protects all trade and business secrets during the course of the proceedings up to the point at which a statement of objections is issued to a cartel participant.[248]

Access to file requests that national authority receive, must be assessed on the national rules that are applicable.[249]

242. Bundeskartellamt 2006, point 11.
243. Ibid, point 18.
244. Ibid, point 11.
245. Ibid, point 12.
246. Ibid, point 14.
247. Ibid, point 16.
248. Ibid, point 21 et seq.
249. Ruster 2017, p. 143.

Prior to the implementation of the Antitrust Damages Directive, the files and information claims of potential victims of competition law infringements against *inter alia* the BKartA, consisted primarily of Article 406e of the German Code of Criminal Procedure (*Strafprozessordnung*, "StPO").[250]According Article 46(3) of the German Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG") the criminal procedural rule was applicable to administrative procedures for competition law infringements.[251]

If an application for fine immunity or fine reduction has been filed, the BKartA refuses applications by third parties to inspect the file or to supply information to the extent allowed, insofar as the leniency application and the evidence provided by the applicant are concerned.[252]

Concerning information requests to the BKartA, the case of *Pfleiderer v Bundeskartelamt* at the regional court of Bonn, already discussed briefly in subsection 2.4.3.4, has been particularly relevant.[253]

In a decision dated January 2008, the BKartA imposed fines totaling EUR 62,000,000 on the three largest European producers of decor paper and on five individuals personally responsible for price-fixing agreements and agreements on capacity closure. Those decisions were based, *inter alia*, on information and documents that the BKartA had received in the context of its leniency programme.

Pfleiderer is a purchaser of decor paper and one of the world's three leading manufacturers of engineered wood, surface finished products and laminate flooring. It stated that over the previous three years it had purchased goods with a value in excess of EUR 60,000,000 from the decor paper producers against which the BKartA proceedings had been brought. In preparation for civil proceedings for damages, Pfleiderer applied to the BKartA for comprehensive access to the files relating to the decor paper cartel proceedings. Pfleiderer received a version of the three decisions imposing fines, from which identifying information had been removed, and a list indicating the evidence collected in a search. Pfleiderer then also expressly requested, by means of a second application, access to the leniency applications, the documents voluntarily transmitted by the immunity recipients, and the evidence collected. The BKartA informed Pfleiderer that it intended to comply with Pfleiderer's request only in part.

The BKartA removed confidential business information, internal documents and documents covered by point 22 of the BKartA's Leniency Programme. Point 22 makes clear that where an application for fine immunity or a fine reduction has been filed, the BKartA must refuse applications by third parties to inspect the file or to supply information to the extent allowed, insofar as the leniency application and the evidence provided by the applicant are concerned.

250. Ruster 2017, p. 144.
251. Ibid.
252. Bundeskartellamt 2006, point 22. See for more information Voet van Vormizeele 2006, para 4 *Vertraulichkeitsschutz*.
253. Ruster 2017, p. 144 et seq.

Pfleiderer's appeal against that decision went to the regional court in Bonn.

The court stated that, in accordance with paragraph 406 e) of the German Code of Criminal Procedure, which governs access to files for victims in criminal proceedings and which applies by analogy to cartel proceedings concerning administrative offences pursuant to paragraph 46 (1) and the last part of the fourth sentence of paragraph 46(3) of the German Administrative Offences Act,[254] a lawyer acting for the aggrieved party may be granted access to the files and the evidence held by the authorities insofar as it can demonstrate a legitimate interest in that regard. However, the court also realizes that if the BKartA was obliged to reduce this level of protection in order to grant third parties access to leniency applications, which would be contrary to point 22 of its leniency programme, this would possibly have two serious consequences. First, the European Commission would no longer provide the BKartA with information based on leniency applications. The other members of the ECN would also not provide the BKartA any such information, insofar as the national competition authorities of the other Member States have made provision for protection against discovery, within the meaning of the ECN Model Leniency Programme, in their respective national leniency programmes. This would not only have a significant adverse effect on cooperation within the ECN but would also mean that an efficient case allocation within the ECN would no longer be possible. This would call into question the entire operating capacity of the ECN.[255] Second, undertakings might potentially be dissuaded from cooperating within the framework of the leniency programme and cartels would not be reported and would remain undetected because leniency applicants would fear that the documents and information that they had voluntarily transmitted might be used directly against them in civil claims for damages. In that way the applicant for leniency would even be placed in a worse position than those cartel members who do not cooperate with the competition authorities.[256]

In light of these doubts, the court decided to stay the proceedings and raise a question to the CJEU for a preliminary ruling.[257] The CJEU decided that, in the consideration of an application for the access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favorable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation and to weigh the respective interests in favor of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency.[258] That assessment can be made by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case. As an answer to the judgment of the CJEU, the court

254. Amtsgericht Bonn 4 August 2009, 51 GS 53/09.
255. Ibid.
256. Ibid.
257. Ibid.
258. CJEU 14 June 2011 (*Pfleiderer AG v BKartA*), point 29.

in Bonn withdrew its originally intended decision to grant Pfleiderer full access to the files.

Intermediate Conclusion
Based on the above, victims of cartel infringements seem to have great difficulties receiving leniency documents. Practice shows that regarding the leniency application, the BKartA rejected requests for leniency application information regularly.[259] However, the application of the grounds for refusal may not make it practically impossible to enforce the antitrust damages claims (effectiveness principle).[260] It appears necessary to balance the interests in individual cases.[261] The test set by the ECJ is that there should be a weighing of the two factors (i.e. the need for a litigation process in which information could be disclosed if necessary for a victim of a cartel to claim for damages v. the protection of the leniency programme by keeping information confidential), which should be conducted on a case-by-case bases under national law.

It is significant to note that information could also have been obtained via civil courts based on national disclosure and discovery rules.[262] This applies in particular to the right of discovery in common-law countries, like the United States (see Chapter 5), the United Kingdom and Ireland. However, in countries like Germany and the Netherlands, there are other opportunities to collect information that may also have the consequence that information has to be provided.[263] That is certainly the case with the arrival of the new disclosure provisions in the Antitrust Damages Directive (see further in Chapter 4).

2.4.4 BKartA's Leniency Policy Practice

In Germany, the leniency policy plays an important role in the fight against cartels. In its submissions to the Bonn court, the BKartA argued that, at the national level, its leniency programme, which was introduced in 2000 (Notice No 68/2000), has proved to be a highly effective tool in the fight against cartels.[264]

From 2001 to 2008, the BKartA received a total of 210 leniency applications in 69 different cases. In the first quarter of 2009, there were already 12 applications in nine cases. In 2013, the BKartA received 66 leniency applications in 41 different cases.[265] In 2014, the BKartA received 72 leniency applications in relation to 41 different cases. There appears to be a trend towards more leniency applications.

The court of appeal in Düsseldorf has comprehensively examined the German Leniency Programme. In its judgment of 27 March 2006, it held that the German le-

259. Ruster 2017, pp. 145-146.
260. Ibid, p. 145.
261. Ibid.
262. See *inter alia* Ruster 2017, pp. 143-184.
263. Billiet 2009, p. 17; Immenga & Mestmäcker 2007, nr. 268; European Competition Lawyers Forum 2006.
264. AG Bonn Decision 4 August 2009 - 51 Gs 53/09. See also Reuter 2016; Kersting 2014.
265. http://www.bundeskartellamt.de.

niency programme was within the limits of the BKartA's reasonable discretion and was not violating any administrative rules.[266]

i. Immunity from the Fine

The court of appeal examined whether the leniency programme was in accordance with the Administrative Offences Act, as according to Article 81 (2) (1) of the Administrative Offences Act the creation of a cartel is an administrative offence. The court of appeal issued a reminder that according to Article 47 of the Administrative Offences Act, the prosecution of offences is within the reasonable discretion of the prosecution authority.[267] The existing discretion is wide.[268] The authority must consider all circumstances of the case, especially the relevance and the impact of the infringement, the seriousness of the misconduct, the attitude of the infringer towards the offence, its conduct after the crime and the risk of recurrence. The BKartA would exceed its policy freedom only if it chose to refrain from prosecuting the offender arbitrarily or on the basis of improper consideration.[269]

The court of appeal emphasized that in completely relieving the infringer from any obligation to pay a fine, the leniency programme remained within the limits of its reasonable discretion.[270] It held that a cartel can be detected and stopped only from the inside. Therefore, effective incentives have to be created for those cartel members, which contributes substantially to the detection of the cartel.[271] Furthermore, the BKartA gave assurances that 100 percent leniency was only granted under strict conditions in its leniency programme.[272] Cartel members playing a decisive role in establishing the cartel or extraordinarily benefiting from it, for example, are explicitly barred from 100 percent leniency.[273]

In its assessment of the leniency programme, the court of appeal referred to the legislative explanatory memorandum.[274] In 2005, legislators introduced a new statutory provision (Article 81(7) of the ARC) stating that the BKartA had discretionary power to set the fine:

> *"The Bundeskartellamt may lay down general administrative principles on the exercise of its discretionary powers in assessing the fine, in particular in setting the amount of the fine, and also with regard to its cooperation with foreign competition authorities."*

Concerning the new provision, the Explanatory Memorandum (BT-Drucks. 15/3640) stated that the new paragraph 7 made clear that the BKartA was authorized to establish general management principles for the exercise of discretion in determining

266. OLG Düsseldorf 27 March 2006, VI-Kart 3/05 (OWi).
267. Ibid, point 201 et seq.
268. Ibid.
269. Ibid.
270. Ibid.
271. Ibid.
272. Ibid.
273. Ibid.
274. Ibid.

the amount of the fine.[275] This included in particular principles for the full or partial reduction of a fine that takes into account the willingness of individual cartel members to uncover the cartel.[276] Such administrative principles concretize the prosecution discretion of the BKartA in a permissible manner.[277]

ii. Reduction of the Fine

In a second step, the court of appeal stated that the way in which the Bonus Scheme determined a reduction of a fine was also in accordance with the criteria in Article 17(3) of the Administrative Offences Act.[278]

According to Article 17(3) of the Administrative Offences Act, a fine must be assessed on the basis of the importance of the offence and accusations against the offender. Furthermore, the economic circumstances of the offender must also be taken into account.[279]

According to the court of appeal, the special circumstances of the offender, such as its contribution in detecting the cartel are to be taken into account. This is particularly important in complicated settings in which the cooperation of the offender in discovering the offence is necessary. In such a circumstance, cooperation shows the offender's understanding of the offence committed.[280] The court of appeal states that the leniency programme uses criteria in determining several fine gradations and held that reduction of the fine (like immunity from a fine) was also in accordance with the law.[281]

The claimants appealed, but in the appeal the legitimacy of the leniency policy was no longer at issue.[282]

In a later decision of the court of appeal in Düsseldorf, the German leniency programme was again a point of discussion.[283] The court of appeal referred to the outcome of the 2006 case as far as it concerned the leniency programmes' compliance with Article 47 and Article 17(3) of the Administrative Offences Act. Furthermore, the court of appeal held that information provided by an infringer who had been granted leniency may legitimately be used as evidence in the cartel procedure. One point of discussion was Article 136(a)(1) of the German Code of Criminal Procedure, which states *inter alia* that holding out the prospect of an advantage not statutorily intended is prohibited. Article 136 of the German Code of Criminal Procedure is applicable here, as the Administrative Offences Act does not contain any specific rule and Article 46 of the Administrative Offences Act states that therefore the rules of the German Code of Criminal Procedure are applicable in

275. OLG Düsseldorf 27 March 2006, VI-Kart 3/05 (OWi), point 201 et seq.
276. Ibid.
277. Ibid.
278. Ibid.
279. Ibid.
280. Ibid, point 207 et seq.
281. Ibid.
282. BGH 19 June 2007, KRB 12/07.
283. OLG Düsseldorf 30 March 2009, VI-2 Kart 10/08 OWi.

cartel procedures. Pursuant to German criminal case law, it is indisputable that statements obtained in violation of this prohibition may not be used in German criminal procedures.[284]

The court of appeal stated that a leniency policy holding out the prospect of a fine reduction in exchange for the cooperation of the leniency applicant does not constitute a prohibited method of examination within the meaning of Article 136(a)(1) of the German Code of Criminal Procedure. The court's reasoning was that the leniency programme was in accordance with the law and therefore holding out its benefits was intended by the legislator and therefore does not infringe the German Code of Criminal Procedure.[285]

It follows from those cases that under German law the leniency programme is a result of the proper exercise of the discretion granted to the BKartA by Article 47 and Article 17(3) of the Administrative Offences Act. The German policy appears to place more importance on destroying cartels than on prosecuting individual cartel members.

2.4.5 Evaluation of the German Leniency Policy

Over the years, the cost-benefit analysis has been becoming more beneficial for a leniency applicant. Fines (including personal fines) for other infringers are more severe, so there are greater benefits for a leniency applicant, especially when a 100% reduction of the fine is granted.

Like the European Commission, the competition authority in Germany is also aware of the fact that a leniency policy should, to be effective, be set and carried out in a clear, predictable, transparent and non-discriminatory way. German policymakers have changed the leniency policy accordingly. These changes have certainly had a positive influence on the effectiveness of the policy.

The existence of separate "decision divisions" (*Beschlussabteilungen*) may mean that undertakings consider the German system and particularly its decision-making to be more equal, more predictable, more transparent and clearer than they would for authorities where the departmental separation is less obvious. With the legal framework, the independence from the Decision divisions is properly safeguarded. This could have a positive influence on the effectiveness of the German leniency policy.

Another positive element for the effectiveness of the leniency policy is that the BKartA is not required to publish its decision to impose a fine. It could be important for undertakings — when it comes to potential civil actions for example — that information concerning the cartel is not necessarily made public.

284. BGH 10 May 2011, NStZ 2001, 551. See also Meyer, Goßner & Schmitt 2017, § 136 a, para 29.
285. OLG Düsseldorf 30 March 2009, VI-2 Kart 10/08 OWi.

There seems to be room for further improvement of the German leniency policy. Apart from the discussion about the various leniency policies in Europe and their harmonization (see Sections 2.6 and 2.7), there are some issues concerning the German leniency policy that do need attention.

First of all, the leniency policy is set out in policy rules. As already described, a clear advantage is that it is pragmatic in that it is easier to change policy rules than legislation. However, there are also disadvantages to relying on policy rules. Policy rules can be changed rather quickly, which makes them prone to uncertainty. Moreover, policy rules are not subject to democratic oversight.[286] Democratic oversight is found only in generic legislation setting the maximum level of the fines. Furthermore, a final disadvantage of policy rules is that a court is not bound by policy rules if the court considers the policy rules to violate legislation.

More uncertainty stems from the fact that the exact reduction of the fine is often unclear to leniency applicants. The BKartA has discretion in deciding the level of fine reduction, of up to 50 percent. This creates uncertainty about what the fine for the undertaking will actually be.[287]

Another point of criticism relates to the fact that the leniency policy does not cover potential criminal enforcement. Although criminal enforcement in Germany is only secondary in the fight against cartels, this could influence the decision-making of an undertaking and its employees in applying for leniency.[288] When a company conducts its cost-benefit analysis, any criminal enforcement will likely play a role in its decision-making. This could affect the effectiveness of the German leniency policy.

Fourth, the information provided by leniency applicants seems to be protected to a large extent. It is difficult to receive information from the BKartA. Moreover, the Antitrust Damages Directive provides that the leniency statement cannot be used in civil proceedings. Having said that, the test set for providing leniency documents is that two factors should be weighed: the need for a litigation process in which information could be disclosed if necessary for a victim of a cartel to claim for damages versus the protection of the leniency programme by keeping information confidential. This exercise should be conducted on a case-by-case bases under national law. This may imply that information, also in relation to the leniency application, will have to be provided. As long as it is not completely clear what information potentially has to be provided, this can lead to uncertainty. In addition, practice shows that also from other non-confidential information from the authority claims may be expected, also for leniency applicants. In other words, it appears that the protection of the leniency information does not prevent proceedings for damages against the immunity recipient. This will be further discussed in Chapters 4 and 6.

286. Appeldoorn & Vedder 2013, p. 88.
287. Henry 2005, p. 21.
288. Schroeder 2006, pp. 452-453.

2.5 Dutch Leniency Policy

2.5.1 Introduction

Like the German leniency policy, the Dutch policy is also based on the European leniency policy.[289] The first Dutch leniency policy was established in 2002. However, before 2002, the ACM had provided reductions of fines to undertakings providing information concerning cartels. The first reduction of a fine in the Netherlands related to the case of *FEM/De Week* in 1999.[290]

The latest alignment of the Dutch leniency policy was made in 2014. The official name of the 2014 Leniency Policy Rule is the "Policy Rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112586, on the reduction of fines in connection with cartels". The main modification in the latest version comes from the Minister of Economic Affairs who prepared and issued this leniency policy. The ACM drew up earlier versions in 2002, 2007 and 2009. The Minister received this power from Article 21 of the independent governing body framework act (*Kaderwet zelfstandige bestuursorganen*). The reason for this change was that the Minister of Economic Affairs thought that it was desirable to strictly separate those who set the policy from those who carry it out.[291] In doing so, the Minister determines the general policy without being allowed to specifically address individual cases.[292]

As is the case for the European Commission's and the German leniency policies, the Dutch leniency policy is set out in policy rules. Although these rules are not enshrined in law (described above in Sections 2.3.4 and 2.3.5), the compliance of the parties concerned with the leniency policy can be invoked by the ACM on the basis of the principles of sound administration.

The ACM is charged with ensuring that undertakings and associations of undertakings do not violate the anti-cartel provisions of Article 101 of the TFEU[293] and Article 6 of the Dutch Competition Act ("DCA").

Article 6 (1) of the DCA states that agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings that are intended to, or will, result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof are prohibited.

Section 2.5.2 below describes the role and powers of the ACM as a competition authority. Section 2.5.3 provides an overview of the current Dutch leniency policy and looks at the special leniency treatment given to construction cartels in the Netherlands. Section 2.5.4 discusses and analyses how the Dutch leniency policy functions in practice. Section 2.5.5 evaluates the Dutch leniency policy as it is known today.

289. Netherlands Ministry of Economic Affairs 2014 (Policy rule on the reduction of fines), p. 14.
290. Van der Meulen & Van Oers 2002, p. 163.
291. Netherlands Ministry of Economic Affairs 2009, Explanatory Notes.
292. ACM Act (*Instellingswet ACM*), Article 9.
293. See Chapter 10 of the DCA concerning the application of European Competition Rules.

2.5.2 Enforcement by ACM

The ACM is an autonomous administrative authority. For the exercise of its powers, the ACM is subdivided into several departments, such as the Antitrust Department, Concentration Department, and the Legal Department.[294]

As an enforcer of competition law, the ACM has several instruments at its disposal to effectively act against infringements of competition law. The ACM has the task of supervising and investigating whether competition infringements take place.[295] Under Chapter 10 of the DCA, the ACM is also the competent authority for the enforcement of Article 101 and Article 102 of the TFEU.

Pursuant to Chapter 7 of the DCA, the ACM can impose an administrative fine, order incremental penalty payments, and issue binding instructions for violations of cartel infringements and for the abuse of a dominant position.[296] The ACM can impose administrative fines to infringers of cartels under Article 57 of the DCA. Since 2016, these maximum fines can amount to EUR 900,000 or 10 percent of the undertaking's turnover, whichever is more. Article 57 (2) provides that the fine can be multiplied by the number of years the cartel was active (with a maximum of four). This fine can be doubled if the infringer is a recidivist. An individual can also be fined up to EUR 900,000.[297] The potentially high fines deviate from the maximum fines in the other Member States, like Germany, and of the European Commission. It was a political wish of the Dutch politicians to introduce higher fines. It should be noted that the ACM is not bound to impose higher fines and it is even unlikely that the ACM will change its policy.[298] It is more likely that it will keep pace with the fine regimes of the other competition authorities within Europe. The new legislation could create uncertainty however, as there is a basis for increasing fines drastically in the (near) future.

Although the leniency policy is set by the Minister, a characteristic of the ACM organization is that it is considered an all-in-one system, whereby almost no formal or physical distinction between investigating and decision-making services is made.[299] The reasoning behind this system is that it would make the competition policy more effective and efficient if all powers are within the same organization.[300] The Board gives instructions to the Antitrust division responsible for the investigation and to the Legal Department, which is *inter alia* responsible for imposing sanctions.[301] This system has been criticized, but because of the presumed effectiveness and efficiency of this system, there are no plans to change it.[302]

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294. Van de Gronden & De Vries 2006, p. 59.
295. See *inter alia* Chapter 6 of the DCA. See also Van de Gronden & De Vries 2006, p. 59.
296. Article 56 DCA.
297. See also Van de Gronden 2017, pp. 378-380; Geursen 2017.
298. *Cf.* Geursen 2017.
299. Van de Gronden & De Vries 2006, p. 59.
300. Netherlands, Parliamentary Papers II 1995/96, p. 50. Van de Gronden & De Vries 2006, p. 59.
301. Van de Gronden & De Vries 2006, p. 60.
302. Ibid.

2.5.3 Present Dutch Leniency Policy

2.5.3.1 *Immunity from Fines*

The ACM grants a leniency applicant immunity from fines if the applicant is the first to submit a request for immunity, if it concerns a cartel into which the ACM has not launched an investigation (which means that the ACM has not yet internally laid down in writing its first suspicion of a cartel) and if the applicant provides the ACM with information that enables the ACM to perform a target inspection.[303]

The ACM grants immunity to the first applicant that submits a request for immunity if the application concerns a cartel into which the ACM has already launched an investigation, but this only applies if the ACM has not yet sent a statement of objections to any of the parties involved and the application provides the ACM with documents that stem from the period of the practice in question and that had not already been in the ACM's possession and on the basis of which the ACM is able to prove the existence of the cartel.[304]

An important factor in whether the applicant is granted immunity is whether the applicant has not coerced another undertaking into participating in the cartel and the applicant cooperates fully and continuously right up until the point that the decision to impose an administrative fine becomes final.[305]

2.5.3.2 *Reduction of Fines*

Under Article 5 of the 2014 Leniency Policy Rule, the ACM grants a leniency applicant a fine reduction of at least 30 percent and no higher than 50 percent, provided that immunity from fines is not available, the ACM has not sent a statement of objections to any of the parties involved in the cartel and the applicant is the first to submit a fine-reduction application that contains information with significant added value and the applicant fully and continuously cooperates right up until the decision to impose an administrative fine becomes final.

Article 6 of the 2014 Leniency Policy Rule makes clear that the ACM grants a leniency applicant a fine reduction of at least 20 percent and no higher than 30 percent, provided that the ACM has not sent a statement of objections to any of the parties involved in the cartel and the applicant is the second to submit a fine-reduction application containing information with significant added value and the applicant fully and continuously cooperates right up until the decision to impose an administrative fine becomes final.

According to Article 7 of the 2014 Leniency Policy Rule, the ACM grants a leniency applicant a reduction of a fine of no higher than 20 percent, provided that the ACM has not sent a statement of objections to any of the parties involved in the

303. Netherlands Ministry of Economic Affairs 2014 (Policy rule on the reduction of fines), Article 4.
304. Ibid.
305. Ibid.

cartel, the applicant is not the first or second to submit an application for a reduction of a fine, the application contains information with significant added value and the applicant fully and continuously cooperates right up until the decision to impose an administrative fine becomes final.

According to Article 18 of the 2014 Leniency Policy Rule, the ACM considers the date, time and the added value of the information to determine the reduction of the fine.

A leniency applicant applying for a fine reduction should provide information with significant added value. The ACM uses this information for finding and proving additional facts leading to an increase in the seriousness or the duration of the violation. The ACM does not take these additional facts into account when determining the level of the fine to be imposed on the leniency applicant providing that evidence.

For leniency applicants, there is an obligation to cooperate, which means that until the decision to impose an administrative fine becomes final with respect to all practices involved in the cartel, a leniency applicant must fully and continuously cooperate as required in the interest of the investigation or the proceedings. This implies that, once the leniency application is submitted, the leniency applicant must, at least, refrain from taking any action that impedes the investigation or the proceedings. In addition, the leniency applicant — of the applicant's own accord or at the ACM's request — must provide the ACM with all information regarding the cartel that the applicant has or may reasonably obtain and ceases its involvement in the cartel, unless and insofar as the ACM considers continued involvement in the cartel to be reasonable in order to preserve the effectiveness of inspections and to ensure that, insofar as reasonably possible, individuals who are working, and have worked, for the applicant are available for making statements.

Article 22 makes clear that a leniency applicant's failure to fulfill the obligations of the grant of leniency renders the grant of leniency null and void. If the grant of leniency is rendered null and void, the ACM may use the information received from the leniency applicant as evidence, and the ACM may impose a fine on the leniency applicant.

2.5.3.3 *Construction Fraud*

There has been a special leniency regime that falls outside the scope of this study. It concerned special rules introduced as a result of the discovery at the beginning of this millennium of widespread bid rigging in the construction industry in the Netherlands. This scandal was named "the Construction Fraud" (*de Bouwfraude*). Almost all construction companies in the Netherlands were agreeing among each other which construction company would win which tender.

Both national politicians and the ACM wanted to end this practice, prompting a process called "*Make a Clean Sweep*".[306] However, carrying out the normal guidelines for the setting of fines would have major implications for the market as a whole.[307] Therefore, the ACM set a special policy for the setting of fines for this market. The result was that the fines were substantially lower than they would have been with the standard procedure.[308] This policy had a few distinguishing features in comparison with the ACM's standard policy. Actually, this special policy entailed not just a kind of leniency policy, but also a kind of settlement agreement.

For example, a fast track was introduced. Undertakings engaging in bid rigging could get a lower fine if they agreed that they would relinquish the right to submit objections or lodge an appeal against a decision. In addition, these undertakings had to reach a consensus with the ACM about civil claims before 15 February 2005. For disclosing a specific project where bid rigging took place, another percentage discount was to be provided. Another fine reduction was granted for cooperating further than required by law. In total, 473 bid-rigging construction companies applied for the special procedure. In total, 379 of these companies were considered leniency applicants.[309]

Some people in the field of competition law are of the opinion that this special policy was a violation of the general principles of proper administration, more specifically, a violation of the principle of equal treatment.[310] According to the district court in several cases, such a defense failed, mainly because the situations and circumstances under consideration were not comparable or equal.[311]

2.5.3.4 *Marker Protection*

Placing a marker allows a leniency applicant to supplement the leniency application for a time period determined by the ACM and protects the applicant's position.[312]

The leniency programme is not only reserved for the first immunity applicant. Markers for the subsequent reduction of fines applicants exist under the Dutch system as well (so called "type 2 markers").

The ACM may allow an applicant to place a marker for an incomplete leniency application if the ACM considers it offers a concrete basis for a reasonable suspicion

306. Netherlands Ministry of Economic Affairs 2005. Process "Make a Clean Sweep" — "het proces schoon schip maken", as how it is known in the Netherlands — was the result of the finding of a massive cartel in the Netherlands. In the Netherlands, more than 400 construction companies used to meet regularly to set prices in their bids and to allocate markets. Although this was a public secret, a whistle blower that handed over parallel accounts of a construction company was needed to bring the topic on the agenda of the Dutch State. This was the start for politicians to hold a parliamentary inquiry. The ACM started its investigations.
307. ACM 2004, p. 33. See also Kuipers 2005, p. 171.
308. Kuipers 2005, p. 169.
309. See *inter alia* Kuipers 2005, p, 164.
310. Ibid, pp. 171-172.
311. See *inter alia* Rechtbank Rotterdam 22 January 2010; Rechtbank Rotterdam 24 July 2007.
312. Netherlands Ministry of Economic Affairs 2014 (Policy rule on the reduction of fines), Article 15 and p. 17 et seq.

of the applicant's involvement in the cartel. To this end, a leniency applicant must at least provide information about its address, the parties in the alleged cartel, affected products and/or services, affected territory, duration of the cartel, nature of the cartel conduct and the other competition authorities inside or outside the EU that have been approached by the leniency applicant in relation to the alleged cartel.[313]

2.5.3.5 *Disclosure of Leniency Information*

Access to file requests that national authority receive, must be assessed on the national rules that are applicable.[314]

The 2014 Leniency Policy Rule makes clear that the ACM will protect the information of the leniency applicant until the statement of objections is issued, except if the ACM is bound by an overriding legal duty or if the leniency applicant has given its consent to disclosure.[315] According to the 2014 Leniency Policy Rule, the ACM does not use evidence received from a prospective leniency applicant or information received as a result of leniency applications submitted in good faith, but which are rejected by the ACM prior to granting leniency to the applicant in question, unless the person or undertaking providing the information consents to the information being used or unless it has already come into the ACM's possession from other sources.[316] The ACM discloses a statement made orally to an addressee of the statement of objections only if the addressee (together with its legal representative seeking disclosure on its behalf) commits not to make any copy by mechanical or electronic means and also commits to use the statement solely for the purposes relating to the administrative proceedings in question.

Parties involved in the administrative procedure of the ACM itself could have access to the leniency applications and information. According to the Tribunal, the success of ACM's leniency programme weighs less heavily than the defense interest of the other parties. [317]

According to Article 3 of the Government Information Public Access Act ("GIPAA"), any person may request access to documents which contain information about governmental matters and which are located with a government body.[318] Hence, also third parties. Identifying an interest in the documents or a reason for the request is not necessary. Once access has been granted to one person, it is made available to everyone at all times.[319]

313. Netherlands Ministry of Economic Affairs 2014 (Policy rule on the reduction of fines), Article 15 and p. 17 et seq.
314. Ruster 2017, p. 143.
315. Netherlands Ministry of Economic Affairs 2014 (Policy rule on the reduction of fines), Article 26.
316. Ibid, Article 25.
317. See *inter alia* CBb 2 December 2015 (*Meelkartel*), point 6.
318. Fierstra *et al.* 2009.
319. See *inter alia* Spaans & Mensink 2010; Spaans & Mensink 2008.

The grounds for denying access to documents are stated in Articles 10 and 11 of the GIPAA. Article 10(1) of the GIPAA provides the absolute grounds for refusal.[320] Article 10(2) of the GIPAA lists the relative grounds for refusal.[321] A document does not have to be disclosed if the importance of providing the information does not outweigh the interests enumerated in Article 10(2) of the GIPAA.[322] Some grounds for refusing access could be particularly relevant in competition law cases, as the competition authority often relied on these. These grounds include the following: business and manufacturing data; the relations of the Netherlands with other countries and international organizations; the detection and prosecution of criminal offences; the inspection, verification and supervision by administrative bodies; the disproportionate advantaging or disadvantaging of natural or legal persons involved in the matter or of third persons; and, in accordance with Article 11(1) of the GIPAA, policy opinions contained in documents drafted for the purposes of internal consultation.[323]

Under Article 10(2d) of the GIPAA, the ACM may refuse access to information if the information is needed for investigation purposes.[324]

Article 10(2g) of the GIPAA refers to the disproportionate advantaging or disadvantaging of natural or legal persons involved in the matter or of third persons.[325] This ground for refusal could be specifically relevant to litigation. It could be argued that documents from the administrative file should not be disclosed because it would discourage cartel participants from applying for leniency and thus disadvantage those who would therefore never realize that they are the victims of a cartel. This would jeopardize competition law enforcement in general, including public enforcement and the private litigation process. Other leniency applicants and other private enforcement claimants in other cartels could be negatively affected by such a decision as their cartel may not be discovered.

Under Article 11(1) of the GIPAA, internal ACM documents are not accessible. Article 11 ensures the free exchange of thoughts and opinions within the ACM or between the ACM and other administrative bodies or advisory bodies.[326] Documents drafted for the purpose of internal consultation may originate from third parties.[327] Access to internal documents may be refused only if and insofar as they contain personal policy opinions.[328] To fulfil this condition, it is not enough for personal opinions to have some effect on the content of the documents.[329] Documents containing factual information could not be considered personal policy opinions.[330] Whether

320. Daalder 2011, p. 281.
321. Fierstra *et al.* 2009.
322. Ibid.
323. Ibid.
324. Daalder 2011, p. 340.
325. Ibid, p. 372 et seq.
326. Fierstra *et al.* 2009.
327. Ibid. See also Daalder 2011, pp. 248 and 265.
328. Fierstra *et al.* 2009. See also Daalder 2011, p. 246.
329. Fierstra *et al.* 2009.
330. Daalder 2011, p. 267.

the authors of the documents conducted assessments is decisive.[331] As a general rule, access cannot be denied categorically. If partial publication is possible, access to that part will have to be granted. Categorical refusal is allowed only if the objective facts and the personal policy opinions cannot be distinguished from each other.[332]

Next to the exceptions of the GIPAA, there is another important rule concerning disclosure by the ACM which is set in Article 7 of the ACM Act (*Instellingswet ACM*). A case from the Rotterdam district court shows that Article 7 of the ACM Act provides a special disclosure regime that has priority over the rules of the GIPAA.[333] Information received by the ACM on the basis of its statutory duty may be used only to execute the duties provided in Article 2 of the ACM Act. According to the district court, the ACM has an obligation to keep the information confidential. [334]

It has become clear as a result of several ACM decisions that it is difficult for parties that would like to claim for damages, to obtain the relevant documents from the ACM. The exceptions incorporated into the GIPAA and the ACM Act prevent access to competition files.[335]

Intermediate Conclusion

Based on the above, it appears very difficult for victims of cartels to obtain leniency documents from the ACM. The author is not aware of any case in which leniency information has been provided to a party that would like to obtain damages. Based on EU law however, an absolute ban appears not allowed. The test set by the ECJ is that there should be a weighing of the two factors (i.e. the need for a litigation process in which information could be disclosed if necessary for a victim of a cartel to claim for damages v. the protection of the leniency programme by keeping information confidential), which should be conducted on a case-by-case bases.

It is significant to note that information could also have been obtained in civil courts via the national disclosure and discovery rules.[336] This applies in particular to the right of discovery in the common-law countries, like the United States (see Chapter 5), the United Kingdom and Ireland. However, in countries like Germany and the Netherlands (see further in Chapter 4), there are other opportunities to collect information that may also have the consequence that information has to be provided.[337]

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331. Daalder 2011, p. 268.
332. Fierstra *et al.* 2009.
333. Rechtbank Rotterdam 13 May 2015 (*Sandd v ACM*), point 5.4 et seq.
334. Ibid.
335. From the Decision ACM 25 June 2007, Case 6112 (*Martens & Van Oord Aannemingsbedrijf B.V. en T.G. van Oord Holding B.V.*) it becomes clear that the ACM is reluctant to provide information related to a leniency application. Bringing the leniency applications into the public domain would harm the operations of the ACM in an unacceptable manner. *Cf.* Decision ACM 18 May 2010, Case 6881/33 (*Wob-verzoek xCAT.nl Publishing*); Decision ACM 8 June 2010, Case 6924 (*Wob-verzoek Automark*); Decision ACM 5 March 2009, Case 6566 (*Wob-verzoek J. Zwaga*). See also Haasbeek 2009, pp. 137-147.
336. See *inter alia* Ruster 2017, pp. 143-184.
337. Billiet 2009, p. 17; European Competition Lawyers Forum 2006.

2.5.4 Dutch Leniency Policy Practice

An appeal from an ACM decision goes to a district court Rotterdam. From there, an appeal goes to the Trade and industry appeals tribunal (*College van Beroep voor het bedrijfsleven* or "Tribunal"), an administrative court that is the highest court of appeal in competition law matters.

In a 2009 case, the district court of Rotterdam stated that the ACM had discretion in setting fines as long as it remained within the statutory boundaries.[338] In this case, the district court also accepted the ACM's leniency policy.

In a later case, a decision of the district court was appealed to the Tribunal. In the Tribunal's decision, the Tribunal answered several questions regarding the leniency policy applied by the ACM.[339] The plaintiff's first objection was that it was of the opinion that the district court was required, in reviewing the amount of the fine, to fully assess the fine reduction provided under the leniency policy.

The Tribunal held that the district court had correctly stated that the ACM had some discretionary power under Article 56 of the DCA in relation to setting a fine.[340] The discretionary power is limited by generally binding legal provisions, fundamental legal principles, and the principles of sound administration.[341] This implied that the court would take a reticent approach in assessing whether the ACM had used its power correctly.

In a 2011 case, the Tribunal pointed out that the fine stated in Article 57(1) of the DCA could not go beyond a maximum amount corresponding to the turnover of the undertaking involved.[342] Article 57(2) of the DCA makes clear that in setting the fine, the gravity and duration of the offence are taken into consideration. The Tribunal held that the ACM had, having regard to Article 57(1) and (2), some discretion in determining the criteria for the fine and the fine itself.

In the cases, the Tribunal pays a good deal of attention to the setting of fines and to the leniency policy. It makes clear that, under the settled case law, including that of the European Court of Human Rights and the CJEU, a court should fully review the level of the fine. That implies that a court assesses whether, having regard to all the relevant facts and circumstances, there is any disproportionality between the infringement and fine. If the court considers that the standard has been misapplied, a court is allowed to reduce the fine.

With the imposition of a fine, the ACM is, first of all, bound by Article 57(1) of the DCA, which states that a fine cannot go beyond the maximum amount often relative to the turnover of the undertaking involved. Furthermore, under Article 57(2) of the DCA, in setting the fine, the gravity and duration of the offence should be taken

338. Rechtbank Rotterdam 22 January 2010 (*Geelen Beton Posterholt B.V. and Others v ACM*).
339. CBb 18 March 2010 (*Imtech N.V. v ACM*).
340. Ibid.
341. Ibid.
342. CBb 8 February 2011 (*ACM v Aannemersbedrijf A and Others*).

into consideration. Moreover, according to the court, a large number of circumstances that differ from one case to the other should be taken into account. Circumstances that can be relevant in setting the fine can include possible repetition of the offence, the willingness to cooperate in ending the infringement and the amount of the infringer's improper advantage. Within the above quoted boundaries, and in compliance with the statutory maximum, the ACM is given some discretion in the assessment of the fine.

The cases indicate that the leniency policy is accepted in the Netherlands and that the ACM has some discretion in setting the fine. The courts acknowledge the discretionary power of the ACM, except if ACM oversteps the boundaries set out in generally binding legal provisions, or if it violates fundamental legal principles or principles of sound administration. Dutch courts adopt a reticent approach in their review of ACM fine-setting.

According to the ACM, leniency played a role in 40 percent of the cartel cases between 2005 and 2009.[343] In its 2009 Annual Report, the ACM acknowledges the importance of leniency as an instrument of enforcement. The construction fraud (*Bouwfraude)* cases are not incorporated into these calculations. Regardless, even bearing in mind that the construction fraud cases are not included, the 40 percent seems very low.

It is likely that the ACM meant to say that in 40 percent of the cases a leniency application was the reason for starting the investigation. For example, this was the situation in the 2006 case concerning the market for surface coating for preserving and decorating metal (*Verzinkerijen*), in which the first applicant was provided full immunity, and most of the others were granted a reduction of the fine of between 15 to 35 percent.[344] In another 2007 cartel case concerning metal grates (*Metalen Roosters*), the first applicant was provided full immunity from fines. The second and third applicants were granted 15 percent and 10 percent reductions respectively.[345]

There have been also several other cartels, however, where leniency did not lead to detecting cartels but provided additional information for the ACM to prove the cartel's existence. For example, this was the situation in a tree nurseries cartel (*Boomkwekerijen*). It was the Fiscal Information and Investigation Service and Economic Investigation Service (FIOD-ECD) that provided the ACM with information concerning the cartel in the first place. Later on, however, two of the nine tree nurseries were granted a reduction of 65 percent and 15 percent of the fine.[346] In 2009, in a painting business cartel (*schildersbedrijven*), one of the painting businesses applied for leniency and granted a reduction of 60 percent.[347]

Although exact facts and figures are not provided by the ACM, Chris Fonteijn, Chairman of the Board of the ACM has noticed that lately more companies and

343. ACM 2009.
344. Decision ACM 4253, 28 December 2006 (*Verzinkerijen*).
345. Decision ACM 5210, 10 December 2007 (*Roosters*).
346. Decisions ACM 5211, 13 November 2007 and 08 May 2008 (*Boomkwekerijen*).
347. Decisions ACM 6601, 6429, December 2009 (*Schilderwerken*).

individuals, even from outside the Netherlands, are applying for leniency at the ACM.[348]

It is also interesting that sometimes the ACM does not reduce the fines because the companies involved provided no information. The first group of these cases, in 2008, involved the domestic services market.[349] The second group of cases, in 2009, involved the market for paintwork.[350] As no fine reductions were provided, it seems that none of the infringers applied for leniency. This has probably something to do with the fact that the fines in these cases were relatively low. The market taken into account by the competition authority for setting the fine related to the value of the contract only. As discussed above in Section 2.2.3.1, if there is not a severe punishment, leniency is not an interesting instrument in uncovering cartels.[351] The cost-benefit analysis is possibly not interesting enough. In this kind of cartel in particular (i.e. bid rigging), the solution may be to impose fines on the individuals involved.

In July 2010, the ACM imposed its first fines on individuals. In this case, they were found to have been the *de facto* leaders of an infringement.[352]

2.5.5 Evaluation of the Dutch Leniency Policy

It is obvious that the lawmakers and the ACM are increasingly aware of how important it is for the leniency policy, if it is to be effective, to be set and carried out in a clear, transparent, predictable and non-discriminatory way. The changes made to the previous leniency policies certainly had a positive influence on the effectiveness of Dutch leniency policy. Also, the imposition of higher fines and individual fines, in combination with the possibility of full immunity made it more interesting to actually apply for leniency.

Despite the above, parts of the Dutch leniency policy could still be changed in order to provide an even clearer, more transparent, more predictable and more equal leniency policy. This would lead to an even more effective leniency policy and, hence, even more effective competition law enforcement.

Apart from the discussion about the various leniency policies within Europe and their harmonization (or lack thereof), which is specifically dealt with in Sections 2.6 and 2.7, there are a few other issues concerning the leniency policy that do need attention.

First of all, Dutch leniency policy is set out in policy rules, prepared by the Minister. As said before, one clear advantage of this is that it is easier to change policy rules

348. Fonteijn 2014, p. 8.
349. Decision ACM 5851, 19 September 2008 (*Thuiszorg 't Gooi*); Decision ACM 6108, 19 September 2008 (*Thuiszorg Kennemerland*).
350. Decision ACM 6492, 21 August 2009 6492 (*Schilderwerken Tongelreep*); Decision ACM 6430, 21 August 2009 (*Schilderwerken Meiveld*); Decision ACM 6431, 5 June 2009 (*Schilderwerken Kazerne II*).
351. *Cf.* Motchenkova 2005, p. 34.
352. Decision ACM 1528, 14 July 2010 (*Koninklijke Wegener N.V.*).

than legislation. However, policy rules can be changed rather too easily, which implies uncertainty for leniency applicants and other stakeholders. Another difficulty is that policy rules are not subject to democratic approval.[353] Democratic approval is found only in general legislation setting the maximum level of the fine. Finally, the court is not bound by policy rules if the court considers the policy rules not to be in compliance with the legislation.

Second, the actual amount of the fine reduction is often unclear and uncertain for leniency applicants. The ACM has a significant amount of discretion as to how much the fine will be.

Third, the choice of an all-in-one system within the ACM may have a negative influence on the effectiveness of the leniency policy because although there is a formal distinction between the investigators and the decision-makers, in practice, Chinese walls do not always appear to function properly. There is a risk of undertakings not believing that the policy will be applied in a clear, predictable, transparent and equal way. The case of *ETB Vos B.V. v ACM* makes clear that this fear is justified.[354] In this particular case, although it is prohibited by Article 54a of the DCA, the same ACM officials investigating the cartel were active during the fine-determination stage. It could be argued that the organization and hence the leniency policy are considered as less reliable, resulting in a lack of sense of trust. This is the risk and disadvantage of having an all-in-one system.[355] Obviously, this situation creates the appearance of partiality favoring the ACM's investigating officers, resulting in undertakings becoming possibly even more suspicious than they already are about whether they are being treated fairly. Lack of trust of potential leniency applicants in the cartel authority might have a negative effect on the effectiveness of leniency. That is even more the case if the authority's effectiveness is evaluated by the government on the basis of the fines it imposes as has happened in the Netherlands.[356] This potentially creates an incentive for the competition authority to set high fines and provide low fine reductions. It cannot be ruled out that those circumstances have an influence on whether and the extent to which parties consider the competition authority trustworthy.

Fourth, the information provided by leniency applicants seems to be protected to a large extent. It is difficult to receive information from the ACM. Having said that, the test set for providing leniency documents is that there should be a weighing of the two factors (i.e. the need for a litigation process in which information could be disclosed if necessary for a victim of a cartel to claim for damages v. the protection of the leniency programme by keeping information confidential), which should be conducted on a case-by-case bases under national law. This may imply that information, also in relation to the leniency application, will have to be provided. As long as this is not completely clear, this can lead to uncertainty. In addition, it should be realized that practice shows that also from other non-confidential information from the authority, like the decision to set a fine — often published on the

353. Appeldoorn & Vedder 2013, p. 88.
354. Rechtbank Rotterdam 28 April 2009 (*ETB Vos B.V. v ACM*); Molin 2009, p. 196 et seq.
355. See also De Pree 2006, pp. 175 and 176.
356. *Cf.* VVD & PvdA 2012, p. 71. *Cf.* Geursen 2017.

internet — claims may be expected, also for leniency applicants. In other words, it appears that protecting the leniency information, does not prevent proceedings for damages against the immunity recipient. This will be further discussed in Chapters 4 and 6.

2.6 Interaction of Leniency Policies Within the EU

2.6.1 Introduction

Within the EU, there is a system of parallel competences in which national competition authorities are active enforcers of Article 101 of the TFEU (ban of cartels) and Article 102 of the TFEU (abuse of a dominant position) alongside the European Commission.[357] In such a system of parallel competences, an application for leniency to one authority is not considered an application for leniency to another authority.[358] In the absence of an EU-wide system of fully harmonized leniency programmes, a logical consequence of such a system is that leniency programmes may apply in parallel, and the applicant may need to file an application to more than one authority.[359]

A parallel competence system is subject to criticism, especially with regard to leniency applications for companies involved in a cartel in more than one Member State. Because of the parallel competence system, it is possible for a leniency applicant to file leniency applications with several individual Member States as well as with the European Commission. This can be a burden in itself. The different requirements to fulfill the individual leniency policies and the different leniency regimes could make it less interesting to give up cartel membership and apply for leniency.[360]

The competition authorities have noticed that the parallel competence system within the EU reduces the effectiveness of the leniency policy. The parallel competence system does have an effect on the clarity, transparency, certainty and equality of leniency within Europe. Therefore, the European Competition Network ("ECN") has researched how to improve the EU's various leniency policies.

2.6.2 Alignment of Leniency Policies

Multiple parallel applications of policy across the EU is a complex exercise and cumbersome process. Possibly dozens of different leniency applications would have to be filed with the different competition authorities. This filing of complete applications to all the various competition authorities could discourage applicants from applying for leniency under any programme.

357. See Regulation No 1/2003.
358. European Competition Network 2012 (2) (ECN Model Leniency Programme), point 1. See also CJEU 20 January 2016 (*DHL v Autorità Garante della Concorrenza e del Mercato*), point 58 et seq.; opinion of Advocat General Wathelet of 10 September 2015, point 64.
359. European Commission 2004 (Notice on Cooperation within the NCA), point 38. See also CJEU 20 January 2016 (*DHL v Autorità Garante della Concorrenza e del Mercato*), point 58 et seq.; opinion of Advocat General Wathelet of 10 September 2015, point 65.
360. See *inter alia* Schroeder 2006, pp. 447-449; Voet van Vormizeele 2006, p. 296.

It was thought that discrepancies in the individual leniency programmes could have adverse effects on the effectiveness of leniency as it influenced the clarity, transparency, certainty and equality of leniency policies.

To ensure that the EU competition rules are applied effectively and consistently and to solve problems relating to the differences between the leniency policies, the European Commission and the national competition authorities have together formed a network of competition authorities for the application in close cooperation of Articles 101 and 102 of the TFEU. This ECN consists of the European Commission and the competition authorities of the Member States. The ECN developed the ECN Model Programme ("ECN model") as a standard.

While it is considered desirable to ensure that all competition authorities operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt a single uniform system. The ECN model therefore sets out the principal elements which, after the soft harmonization process has occurred, should be common to all leniency programmes across the EU. The European Commission and the national competition authorities are committed to seeking the alignment of the programmes in their jurisdictions within the framework specified by the ECN model.[361]

The ECN model is based on the common leniency programme experience of the competition authorities over a number of years and has two principal objectives. Firstly, the ECN model is meant to trigger the soft harmonization of the existing leniency programmes and to facilitate the adoption of such programmes by the few competition authorities that do not operate one. Secondly, it sets out the features of a uniform short form application designed to alleviate the burden on both undertakings and competition authorities of multiple filings in large, cross-border cartel cases.

The aim of the ECN model is — especially when it comes to cross-border cartels — to make leniency more attractive to undertakings and, by doing so, to make the leniency policy more effective.

2.6.3 The ECN Leniency Policy Model

The 2006 ECN model set forth a framework to reward the cooperation of parties to agreements and practices falling within the ECN model's scope. ECN members have committed to using their best efforts, within the limits of their competence, to align their respective leniency programmes with the ECN model. The ECN model does not prevent a competition authority from adopting a more favorable approach towards applicants within its programme.

361. European Competition Network 2012 (2) (ECN Model Leniency Programme), Explanatory Notes, p. 10 et seq.

In November 2012, the ECN clarified and simplified the information that undertakings must provide when applying for leniency to several different authorities. With the 2012 ECN model, all leniency applicants applying to the European Commission in cases involving more than three Member States will be able to submit a summary application to national competition authorities. With the prior ECN model 2006, only the immunity applicant was entitled to use summary applications. In addition, the ECN has agreed on a standard template for summary applications, which undertakings will be able to use in the Member States.

The purpose of the ECN model is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. It sets out the treatment that an applicant can use in any ECN jurisdiction once all the programmes have been aligned. In addition, the ECN model aims to alleviate the burden associated with multiple filings. The European Commission is particularly well placed for this by being able to introduce a model for a uniform summary application system.[362]

It is significant that the ECN leniency policy model does not have the effect of changing the individual leniency programmes. By endorsing the revised ECN model, the heads of the European competition authorities agreed to use their best efforts to align their current and future leniency programmes and practices. In each jurisdiction, the ECN model becomes operational only when it has been introduced into the programme or applied in practice.[363]

To qualify for leniency according to the 2012 ECN model, the applicant must satisfy the following cumulative conditions: (i) The applicant ends its involvement in the alleged cartel immediately following its application, save to the extent that its continued involvement would, in the competition authority's view, be reasonably necessary to preserve the integrity of the competition authority's inspections. (ii) It cooperates genuinely, fully and on a continuous basis from the time of its application to the competition authority until the conclusion of the case. This includes the following: (a) providing the competition authority promptly with all relevant information and evidence that comes into the applicant's possession or under its control; (b) remaining at the disposal of the competition authority to reply promptly to any requests that, in the competition authority's view, may contribute to the establishment of relevant facts; (c) making current and, to the extent possible, former employees and directors available for interviews with the competition authority; (d) not destroying, falsifying or concealing relevant information or evidence; and (e) not disclosing the fact or any of the content of the leniency application before the competition authority has notified its objections to the parties (unless otherwise agreed with the competition authority). (iii) When contemplating making an application to the competition authority but prior to doing so, the applicant has not (a) destroyed evidence falling within the scope of the application; or (b) disclosed, directly or indirectly, the application it is contemplating (either the contents of the application or even the fact that an application is being contem-

362. European Competition Network 2012 (2) (ECN Model Leniency Programme), point 2.
363. European Commission 2012.

plated) except to other EU competition authorities or any competition authority outside the EU.[364]

2.6.3.1 *Immunity from Fines*

Under the ECN model, the competition authority grants an undertaking immunity from any fine that would otherwise have been imposed if: a) the undertaking is the first to submit evidence that, in the competition authority's view, will enable the competition authority to carry out targeted inspections in connection with an alleged cartel; b) the competition authority does not, at the time of the application, already have sufficient evidence for an inspection and the competition authority had not already carried out an inspection in connection with the alleged cartel arrangement; and c) the conditions attached to leniency are met (Type 1A).[365]

With a view to enabling the competition authority to carry out targeted inspections, the undertaking should be in a position to provide the competition authority with the following: (i) the name and address of the legal entity submitting the immunity application; (ii) the other parties to the alleged cartel; (iii) a detailed description of the alleged cartel, including: (iv) the affected products; (v) the affected territory or territories; (vi) the duration; and (vii) the nature of the alleged cartel conduct; (viii) the evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence); (ix) information on any past or possible future leniency applications to any other competition authority and competition authorities outside the EU in relation to the alleged cartel.[366]

In cases where no undertaking had been granted conditional immunity from fines before the competition authority carried out an inspection or before it had sufficient evidence for an inspection, the competition authority grants an undertaking immunity from a fine which would otherwise have been imposed if all of the following conditions are met: a) The undertaking is the first to submit evidence that, in the competition authority's view, enables the finding of an infringement of Article 101 of the TFEU in respect of an alleged cartel; b) at the time of the submission, the competition authority did not have sufficient evidence to find an infringement of Article 101 of the TFEU in connection with the alleged cartel; c) the conditions attached to leniency are met (Type 1B).[367]

An undertaking that took steps to coerce another undertaking to participate in the cartel is not to be eligible for immunity from fines under the model programme.[368]

2.6.3.2 *Reduction of Fines*

Undertakings not qualifying for immunity may benefit from a reduction of any fine that would otherwise have been imposed.

364. European Competition Network 2012 (2) (ECN Model Leniency Programme).
365. Ibid, Section 3.
366. Ibid.
367. Ibid, point 7.
368. Ibid, point 8.

To qualify for a fine reduction, an undertaking must provide the competition authority with evidence of the alleged cartel which, in the competition authority's view, represents significant added value relative to the evidence already in the competition authority's possession at the time of the application. The concept of "significant added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the competition authority's ability to prove the alleged cartel.

To determine the appropriate level of the fine reduction, the competition authority takes into account the time at which the evidence was submitted (including whether the applicant was the first, second, third, etc. undertaking to apply) and the competition authority's assessment of the overall value added to its case by that evidence. Reductions granted to an applicant following a fine-reduction application must not exceed 50 percent of the fine that would otherwise have been imposed.

2.6.3.3 *Marker Protection*

An undertaking wishing to make an application for immunity may initially apply for a "marker".[369] The competition authority has discretion as to whether or not it grants a marker. Where a marker is granted, the competition authority determines the period within which the applicant has to complete the leniency application by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant completes the application within the set period, the information and evidence provided are deemed to have been submitted on the date when the marker was granted.

To be eligible to secure a marker, the applicant must provide the competition authority with its name and address as well as information concerning the following: (i) the basis for the concern leading to the approach for leniency; (ii) the parties to the alleged cartel; (iii) the affected product(s); (iv) the affected territory or territories; (v) the duration of the alleged cartel; (vi) the nature of the alleged cartel conduct; and (vii) information on any past or possible future leniency applications to any other competition authorities and competition authorities outside the EU in relation to the alleged cartel.[370]

2.6.3.4 *Oral Procedure*

The competition authority may allow oral applications at the applicant's request. In such cases, the statements may be provided orally and recorded in any form deemed appropriate by the competition authority. The applicant must also provide the competition authority with copies of all pre-existing documentary evidence of the cartel.[371]

369. European Competition Network 2012 (2) (ECN Model Leniency Programme), point 16 et seq.
370. Ibid, point 18.
371. Ibid, point 28.

No access to any record of the applicant's oral statements is granted before the competition authority has issued its statement of objections to the parties. Oral statements made under the present programme are only exchanged between competition authorities under Article 12 of Regulation 1/2003 if the conditions set out in the European Commission Notice on cooperation within the Network of Competition Authorities are met and if the protection against disclosure granted by the receiving competition authority is equivalent to the one conferred by the transmitting competition authority.[372]

2.6.3.5 *Summary Applications*

In cases where the European Commission is particularly well placed to deal with a case, the applicant that has filed or is in the process of filing a leniency application with the European Commission, either for immunity or for a fine reduction, may file summary applications with any national competition authority which the applicant considers (possibly) well placed to act. These summary applications needs to contain a substantively identical scope to the respective application submitted to the European Commission and should include a short description of the name and address of the applicant, the other parties in the cartel, the affected products, the affected territory or territories, the duration, the nature of the alleged cartel conduct, the Member States where the evidence is likely to be located; and information on its other past or possible future leniency applications in relation to the alleged cartel.[373]

Once it receives the summary application, a national competition authority grants the applicant a summary application marker based on the date and the time when the information was provided to the national cartel authority. If the summary applicant is the first applicant in respect of the alleged cartel at the national competition authority concerned, the national competition authority informs the summary applicant accordingly.[374] If the national competition authorities request specific further information, the applicant has to provide such information promptly.[375] If the national competition authority decides to act in a case, it determines a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the applicable thresholds. If a national competition authority requests the applicant to make a full submission, the applicant must submit to the national competition authority all information and evidence relating to the alleged cartel, subject to the requirements under the relevant leniency programme.[376]

372. European Competition Network 2012 (2) (ECN Model Leniency Programme), points 28-30.
373. Ibid, point 24 et seq.
374. Ibid.
375. Ibid, point 26.
376. Ibid.

2.6.4 Principles of Allocation – Particularly Well Placed

As stated earlier, Regulation No 1/2003 is based on a system of parallel competences in which all competition authorities have the power to apply Article 101 and Article 102 of the TFEU and are responsible for an efficient allocation of work with respect to those cases where an investigation is deemed to be necessary.[377] At the same time, each network member retains full discretion in deciding whether or not to investigate a case.[378] Under this system of parallel competences, cases will be dealt with by the following: [379]

i. a single national competition authority, possibly with the assistance of other Member States' competition authorities; or
ii. several national competition authorities acting in parallel; or
iii. the European Commission.

In most instances, the authority receiving a complaint or starting an ex-officio procedure will remain in charge of the case.[380] Reallocation of a case would be envisaged only at the outset of a procedure where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act.[381] Where reallocation is found to be necessary for the effective protection of competition and in the European Union's interest, network members endeavor to reallocate cases to a single well-placed competition authority as often as possible.[382] In any event, reallocation should be a quick and efficient process and not hold up on-going investigations.[383] An authority is considered to be well placed to deal with a case if the following three cumulative conditions are met.[384]

i. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
ii. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order from which the effect will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
iii. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

The European Commission is particularly well placed if one or several agreements or practices, including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering

377. European Commission 2004 (Notice on Cooperation within the NCA), point 5.
378. Ibid.
379. Ibid.
380. Ibid, point 6.
381. Ibid.
382. Ibid, point 7.
383. Ibid.
384. Ibid, point 8.

more than three Member States or several national markets).[385] Furthermore, the European Commission is particularly well placed to deal with a case if it is closely linked to other EU provisions that may be exclusively or more effectively applied by the European Commission. The European Commission is also well placed if it is in the interest of the European Union for a European Commission decision to be taken as part of the process of developing EU competition policy when a new competition issue arises or to ensure effective enforcement.[386]

These criteria indicate that there must be a material link between the infringement and the territory of a Member State for that Member State's competition authority to be considered well placed.[387] Presumably, in most cases the authorities of those Member States where competition is substantially affected by an infringement are well placed if they are capable of effectively bringing the infringement to an end through either single or parallel action unless the European Commission is better placed to act.[388] The authorities dealing with a case in parallel action endeavor to coordinate their actions to the extent possible.[389]

Regarding the allocation of cases and the broad freedom of the competition authorities to allocate cases, the cases *Si.mobil v Commission* and *easyjet v Commission* are relevant.

In *Si.mobil v Commission* the EGC ruled on the rejection of the European Commission of an abuse of dominance complaint, based on the fact that a national competition authority was already handling the case.

On 14 August 2009, the applicant lodged a complaint with the European Commission concerning an alleged infringement by Mobitel of Article 102 TFEU on the wholesale and retail mobile telephone markets in Slovenia.[390] The Slovenian competition authority had instigated proceedings already on 19 March 2009 and was dealing with the same practices as those which the applicant had referred to in its complaint to the European Commission.[391]
The European Commission refused to act as there was an insufficient degree of European Union interests in conducting a further investigation into the alleged infringements on the wholesale market.[392] Moreover, the European Commission concluded that that Slovenian competition authority was already dealing with the retail market complaints.[393]

The EGC agreed with the European Commission in its rejection to handle the complaints. Regarding the complaints about the retail market, the EGC reminds that it is apparent from the wording of Article 13(1) of Regulation No 1/2003 that

385. European Commission 2004 (Notice on Cooperation within the NCA), point 14.
386. Ibid, point 15.
387. Ibid, point 9.
388. Ibid.
389. Ibid, point 13.
390. EGC 17 December 2014 (*Si.mobil v Commission*), point 3.
391. Ibid, point 5.
392. Ibid, point 7.
393. Ibid.

the European Commission is entitled to reject a complaint on the basis of that provision if it is satisfied that, first, a competition authority of a Member State "is dealing with" the case that has been referred to the Commission and, second, the case relates to 'the same agreement, decision of an association or practice'.[394] As these conditions were fulfilled, it was a valid reason not to handle the case.

Moreover, the EGC reminds that the Notice on cooperation within the Network of Competition Authorities does not create individual rights for the companies involved to have the case dealt with by a particular authority. More generally, neither Regulation No 1/2003 nor the Notice on cooperation within the Network of Competition Authorities create rights or expectations for an undertaking to have its case dealt with by a specific competition authority.[395] Hence, even on the assumption that the European Commission had been particularly well placed to deal with the case and the Slovenian competition authority had not been well placed to do so, the applicant did not have a right to have the case dealt with by the Commission.[396] The EGC further reminds that the competition authorities have a broad discretion in deciding which national authorities handles a case in order to ensure that cases are dealt with by the most appropriate authorities within the network.[397]

In the case *easyJet v Commission*, the EGC ruled that the European Commission is allowed to reject a complaint that has previously been rejected by a national competition authority (on priority grounds). In 2008, easyJet lodged several complaints with the ACM against Schiphol Airport based on the law of aviation and the abuse of a dominant position.[398] In 2009 the ACM rejected the complaints.[399] In 2011 easyJet lodged a complaint with the European Commission.[400] easyJet submitted that the charges set by Schiphol were discriminatory and excessive and amounted to an infringement of Article 102 TFEU. The applicant mentioned, moreover, that it had lodged a number of complaints with the ACM but that that authority had not taken any final decision on the merits of a complaint relating to competition.

In 2013 the European Commission rejected the complaints of easyJet, based on Article 13(2) of Regulation No 1/2003. Article 13(2) of Regulation No 1/2003 states that where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it. In addition, the European Commission found that, in any event, the complaint could also be rejected because the European Union lacked a legal interest, given that, in the light of the ACM's findings, there was very little likelihood of being able to establish an infringement of Article 102 TFEU.

394. EGC 17 December 2014 (*Si.mobil v Commission*), point 33.
395. Ibid, point 39.
396. Ibid, point 40.
397. Ibid, point 43.
398. EGC 21 January 2015 (*easyJet v Commission*), points 2-3.
399. Ibid, points 4-6.
400. Ibid, point 7.

The EGC holds that the European Commission did not err in law in rejecting the applicant's complaint on the basis of Article 13(2) of Regulation No 1/2003, since the European Commission found that the competition authority of a Member State had dealt with that complaint on the basis of Article 102 TFEU.[401]

From the case law, it can be concluded that the authorities have a broad discretion to decide who handles which cases. Regulation 1/2003 and the Notice on cooperation within the Network of Competition Authorities do not create rights or expectations for an undertaking to have its case dealt with by a specific competition authority.[402] Even on the assumption that a competition authority is particularly well placed to deal with a case and another is not well placed to do so, the applicant does not have a right to have the case dealt with by the former.

2.6.5 Evaluation of the Interaction of Leniency Policies

In the 2006 and 2012 ECN models, important steps have been taken to achieve a more unified system of making a leniency application. The EU, German and Dutch leniency programmes are in line with the ECN leniency policy model. As such, it is expected that a more unified system will provide more equality, transparency, clarity and certainty. Also, it can be concluded that leniency as such will become more effective and competition law enforcement more successful.

However, improvements to the system are still possible. This becomes clear, for example, in the European Commission's lift cartel case.[403] Several of the undertakings applied for leniency in the Member States but were disadvantaged because the European Commission encroached on the case, which rendered the submission of the leniency application to the Member States' authorities useless. The undertakings had to apply for leniency with the European Commission but were too late. With regard to the Dutch lift cartel situation, TKL argued that the company had made a leniency application to the national competition authority since everything indicated that the Dutch regulator was the most appropriate authority for dealing with this case. TKL stressed that, after an internal check, it was obvious to the company that it was just about "a local agreement on incidental projects" and on 28 April 2004 the application was made to the Dutch regulator, with a copy sent to the European Commission. It also drew parallels with the Dutch authority's well-published antitrust investigation of tenders and bid rigging in the construction industry, which gave TKL an even greater indication that Dutch officials would be the appropriate regulator. Despite TKL having received leniency from the ACM in the summer of 2004, the European Commission later took over the case. TKL accused the European Commission of "ignoring the basis of its own co-operation notice". "The enforcement of decentralized competition law has become a lottery" TKL added. "You don't know who is going to deal with the case."[404]

401. EGC 21 January 2015 (*easyJet v Commission*), point 62.
402. EGC 17 December 2014 (*Si.mobil v Commission*), point 39.
403. See *inter alia* EGC 13 July 2011 (*Kone and Others v Commission*). *Cf.* CJEU 20 January 2016 (*DHL v Autorità Garante della Concorrenza e del Mercato*).
404. Crofts 2009.

From the above, it becomes clear that also the European Commission Notice on cooperation within the Network of Competition Authorities and the ECN model do not provide sufficient clarity, particularly for cartel infringers that would like to apply for leniency.

The fact that it is still often unclear to parties which authority will handle a case is a lingering hurdle. As shown in the cases above, the consequences can be enormous for infringers. The risk of punishment by other authorities, even if immunity by one of the authorities is provided, lies in wait. As discussed in Section 2.2.3.2, this ambiguity and legal uncertainty could make the leniency system less interesting to infringers, and hence less effective.

In addition to the specific problem of uncertainty in knowing which authority is best placed, in it remains generally quite a hurdle for an undertaking to apply for leniency, especially when it comes to large, cross-border cartel cases. First of all, the rules of the various leniency programmes are still not 100 percent the same. For example, the fine reduction in Germany is different from that provided by the European Commission. Moreover, to the extent that the rules are the same, that does not mean that the application of these rules is automatically the same in each and every Member State. The differences can lead to different treatment for leniency applicants, depending on the authority handling a case. Additionally, with the existing system, in some cases leniency applications have to be filed with more than twenty-five national competition authorities as well as with the European Commission. This could be considered a heavy burden for undertakings.

Enforcement Directive Proposal

In March 2017 the European Commission shared a proposal for a directive of the European Parliament and the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.[405] The first aim of the proposed Directive is to boost effective enforcement of European competition law by empowering national competition authorities to be more effective enforcers of the EU competition rules and to ensure that national competition authorities have the necessary guarantees of independence, resources, enforcement and fining powers.[406] The second aim of the proposal is to provide companies considering leniency a sufficient degree of legal certainty in order to be incentivized to cooperate with authorities.[407] Also the European Commission notes that the divergences in leniency programmes across Europe discourages companies from coming clean and providing evidence of these anticompetitive practices.[408]

The European Commission notes that differences in leniency programmes still lead to different outcomes for leniency applicants in terms of whether they benefit from

405. European Commission 2017 (Proposal Enforcement Directive).
406. Ibid, p. 3.
407. Ibid.
408. Ibid.

immunity from fines or even from fine reductions at all.[409] Companies which are considering reporting cartel behavior to a number of jurisdictions in return for more lenient treatment lack the certainty they need about whether and to what extent they will benefit from this.[410] According to the European Commission, EU action is needed to ensure that a leniency system is available and applied in a similar way in all Member states.[411] From a public consultation regarding the leniency programme it became clear that 61% of the stakeholders found the lack of implementation of the ECN Model Leniency Programme by Member States to be problematic.[412] With the proposed Directive the European Commission suggests to make the provisions of the ECN Model Leniency Programme part of binding legislation by which the Member States are bound.

It should be noted that the proposed Directive only remains a proposal. It is not certain whether it will be adopted in whole or in part. If it is implemented, not much change to the leniency rules in Germany and the Netherlands is to be expected. In both countries, the ECN Model Leniency Programme is already implemented in their national policy rules regarding leniency.

2.7 Evaluation of the Effectiveness of the Leniency Policy Within the EU

2.7.1 Introduction

Section 2.2 analyzed when a leniency policy can be considered effective. Analyzing the effectiveness of leniency programmes within the EU needs a two-step approach because this is how the European system of parallel competence works.

The effectiveness of the individual leniency programme is one issue. However, within the EU, there is the additional issue of cooperation between the Member States and cooperation between Member States and the European Commission.

First, the similarities and differences of the various leniency policies will be analyzed. Second, the process of parallel competence and parallel leniency applications will be discussed. Finally, it will be discussed whether there are ways to make the leniency policies even more effective.

2.7.2 Comparison of the EU, German and Dutch Leniency Policy

The leniency policies of the different cartel authorities are similar to each other to a large extent. All three have adopted the ECN model in one way or another. The main similarities between the leniency policies of the European Commission, the BKartA and the ACM are as follows: each of them is acting on the basis of administrative legislation and use similar administrative fines to enforce the rules of competition; the leniency policies are embodied in policy rules; administrative

409. European Commission 2017 (Proposal Enforcement Directive), pp. 5 and 8.
410. Ibid, p. 8.
411. Ibid.
412. Ibid, p. 17.

fines will be reduced by up to 100 percent; until the introduction of the new rules of the Antitrust Damages Directive, the leniency policy had no effect on possible private and criminal enforcement of competition law; participants that apply for leniency have to cooperate fully and have to end their involvement in the cartel immediately in principle; marker protection has been introduced; and the legislators and competition authorities have devoted specific attention to the confidentiality and inspection of files of the leniency applicant.

The different leniency policies still do contain relevant differences, however.

Full immunity and fine reduction should be guaranteed from the outset in clear and achievable circumstances. With regard to the fine reduction categories, the leniency programme of the European Commission and the Netherlands specify in more detail the reduction that the applicant may expect than is done in the German leniency system.

The fine reductions in the policy rules of the different cartel authorities are not the same. The Dutch leniency policy changed in 2014 so that it was in accordance with the leniency policy of the European Commission. In 2014, the Dutch Ministry of Economic Affairs changed its opinion about the 60 to 100 percent band and aligned with the leniency policy of the European Commission. Regarding the fine reduction, the ACM has aligned its bands with those of the European Commission. If a leniency applicant does not receive immunity, it could still get a reduction of 30 to 50 percent for the first leniency applicant, 20 to 30 percent for the second leniency applicant, and up to 20 percent for other leniency applicants. In Germany, the reduction for leniency applicants not receiving immunity is simply 50 percent or less. The amount of the reduction shall be based on the value of the contributions to uncovering the illegal agreement and the sequence of the applications.[413]

The marker systems differ on important aspects. Only the immunity applicant could receive a marker from the European Commission. The German and Dutch competition authorities also provide a marker to the other leniency applicants that are applying for a fine reduction. It implies that securing the level of fine reduction, without being obliged to hand in a leniency application immediately, is not possible with the European Commission, but is possible in Germany and the Netherlands.

A leniency application made to the ACM or the BKartA may be submitted not just by the undertakings involved in the cartel but also by the individuals that have given the orders to participate in the cartel or factually directed participation in the cartel.[414] The difference between Dutch and German leniency is that the Dutch policy states that for individuals no longer working with the undertaking involved in the cartel at the time of the leniency application, it will be decided on a case-by-case basis whether the they will be granted the same fine reduction as the undertaking. The German policy makes clear that it incorporates former employees under

413. Bundeskartellamt 2006, point 5.
414. Schroeder 2006, p. 452.

the "leniency veil".[415] Concerning this matter, the Dutch leniency policy appears to be less transparent, less predictable and less clear than the German policy.

According to the European Commission's leniency policy, a cartel participant that took steps to coerce other undertakings to join the cartel is not granted immunity. The wording of the text could imply that the mere attempt to coerce appears sufficient to satisfy this test. A fine reduction is the maximum feasible incentive available to such a cartel participant under the EU system. The Dutch and German leniency policies appear to be less strict in providing immunity.[416] No immunity is granted to participants that coerced others to participate in the cartel.

The existence of the "decision divisions" (*Beschlussabteilungen*) in Germany may lead undertakings to consider the German system, particularly its decision-making process, more equal, predictable, transparent and clear. Such a decision division provides more legal certainty and is seen as being more likely to deal with the case only on the facts and on the merits. If ambiguities are removed, cartel infringers can make a more rational decision about whether or not to apply for leniency. Removal of the ambiguities could strengthen the game theory effect of the leniency policy, because a more rational decision can be made if the rules of the game are clearer. As discussed in Section 2.2.3.2, this could have a positive influence on the effectiveness of leniency. When applying for leniency to the European Commission or the ACM, this possible positive influence is lacking.

In contrast to the leniency policy of the European Commission and Germany, it is in principle the Ministry of Economic Affairs that makes the policy rules for the ACM. It could be argued that the Ministry — with its distance to the cartel investigations — is in a better position to decide whether rules are to be set in the interest of the public instead of the interest of the authority. This could be considered as a positive aspect of the Dutch system.

Another difference is that "naming and shaming" appears to be more important to the European Commission and to the ACM. In the German system, the BKartA is not obliged to publish its decision to impose a fine, unlike the EU and Dutch systems, in which the (non-confidential version of the) decision to impose a fine is always made public.[417] Although not directly related to leniency, public release of this information might affect whether cartel cases and cartel participants remain confidential or become public. In the conduct of a cost-benefit analysis, this could negatively influence the effectiveness of leniency.

2.7.3 Interaction of Leniency Policies

Especially for cross-border cartels, a leniency applicant expects transparent, clear, certain and equal treatment in each and every Member State. The introduction of the ECN model is an important step to create a more unified system of leniency

415. Bundeskartellamt 2006, point 17.
416. *Cf.* Wils 2007, p. 33.
417. Regulation No 1/2003, Article 30; ACM Act (*Instellingswet*), Chapter 3, para 3; Jüntgen 2007, pp. 128-137, under III.3.

application. It is expected that a more unified system will lead to more equality, transparency, clarity and certainty and this will lead to the leniency policy becoming more effective and competition law enforcement more successful.[418]

To a large extent, the leniency policies of the various cartel authorities within the European Union are aligned. The cooperation between Member States, mainly via the ECN, has certainly contributed to that. For undertakings, this means greater equality, transparency, clarity and certainty. It also makes it easier to apply for leniency if a single application standard applies.

A more comprehensive comparison, however, shows that there are differences between the different policies.[419] For example, the amount of the fine reduction is not the same in every Member State. Also, the marker systems differ on important aspects. The main challenge for the competition authorities is to change the fact that leniency policies still differ within the EU. Moreover, the hurdle of having different leniency applications for the same cartel should be solved one way or the other. Most likely, a centrally led pan-European system would contribute to further improvement of the effectiveness of the leniency policy and competition law enforcement in Europe. This will be discussed in more detail in Chapter 6.

2.8 Conclusion

A basic premise is that applying for leniency should be beneficial to an undertaking. To be made more effective, a leniency policy should be set and carried out in a clear, transparent, predictable and equal way. Uncertainty, lack of clarity, lack of transparency and inequality jeopardize the effectiveness of the leniency policy.[420] The competition authorities seem to be aware of this as well because they have been adjusting their leniency policies accordingly.

In the last few decades, the three European authorities examined above have made a great effort to optimize their leniency programmes.[421] Overall, the individual leniency policies are becoming more and more comprehensible and provide good guidance and certainty. Looking at the amount of leniency applications, this effort has proven to be fruitful. Many more cartels have been detected. However, there still appear to be ways to further improve the clarity of the leniency programmes. The wide margin in setting the fines and determining the reduction in the fines and the fact that rules are laid down in soft law provisions are factors that may result in a leniency programme that is less effective than it could be. The protection of leniency documents doesn't appear absolute and may differ from case to case. This may lead to uncertainty. Moreover, practice shows that also from other non-confidential information from the authority, like the decision to set a fine — often published on the internet — claims may be expected, also for leniency applicants. In other words, it appears that protecting the leniency information, does not prevent proceedings for damages against the immunity recipient.

418. European Commission 2017 (Proposal Enforcement Directive), pp. 9, 17, 22 and 27.
419. See also European Commission 2017 (Proposal Enforcement Directive), pp. 3, 5 and 8.
420. Jephcott 2002, p. 384. See also Voet van Vormizeele 2006, p. 293.
421. *Cf.* Riley 2010, pp. 191-207.

To a large extent, the leniency policies of the various cartel authorities within the EU have been made to correspond. It is believed that it also have a positive impact on the effectiveness of the leniency policy. The cooperation between Member States, mainly via the ECN, has certainly contributed to that. For undertakings, this means greater equality, transparency, clarity and certainty. However, after a more comprehensive comparison, some differences between the different policies have become apparent (see Section 2.7). The main challenge for the competition authorities in relation to the leniency policy is to change the fact that leniency policies within the EU still contain differences. It would be preferable to have a 100 percent uniform leniency policy for all the Member States and the European Commission. If the policies are made equal, predicable, transparent and clear, it is more likely that cartel infringers will be able to make a more rational decision about whether or not to apply for leniency. It could strengthen the game-theory effect because a more rational decision can be made. As discussed in Section 2.2.3.2, this could have a positive influence on the effectiveness of leniency. In connection with this, a single pan-European leniency system could potentially contribute to an improvement in the effectiveness of the leniency policy and competition law enforcement in Europe. Especially for cross-border cartels, this would take away the hurdle of multiple leniency applications.

These items and possible solutions will be described in more detail in Chapter 6.

Chapter 3

Development of Private Enforcement at the EU level

3.1 Introduction

In order to analyze the relation between leniency and upcoming private enforcement, it is — next to describing the leniency policy in Europe — relevant to describe the development of private enforcement and the way it is interpreted in Europe.

This chapter will start with the history, evolution and maturation of private enforcement within the EU. As Sagan once said, "You have to know the past to understand the present".[422] In the second part of Chapter 3, the existing EU legal framework, as formulated in the Antitrust Damages Directive will be discussed briefly. It also includes some observations on the legislative process of the EU legislator.

3.2 History

3.2.1 Introduction

In some of the Member States, private enforcement of competition law has already existed for quite a while now. But in others it is a relatively new phenomenon. In 2001, private enforcement was placed on the EU agenda when the CJEU made clear that victims of competition law infringements should be compensated for their losses. Since then, the European Commission has set to work on making a policy developing private enforcement as a valuable tool in the fight against competition law infringement, a tool that would supplement the already known, and feared, public law enforcement instruments of the competition authorities.

This Section describes and analyzes the history of private enforcement in the EU. First, the important case law of the CJEU is considered. Then the actions taken by the European Commission are discussed. This starts with a description of the formulated Green Paper, after which the White Paper is discussed. As a result of these Papers and the market consultation process, the European Commission prepared a draft directive in 2009. Several Member States have criticized the 2009 draft, as have a few European institutions including the European Parliament. Because of

422. Quote: Carl Sagan (1934-1996).

this criticism, the plans were shelved. In contrast to Kroes, it appeared that her successor Commissioner Almunia, was not interested in pursuing this matter as vigorously; however, appearances can often deceive. The European Commission was working on a new directive, which was first published in 2013, later amended and accepted in 2014, and had to be implemented into national legislation by the end of 2016.

3.2.2 EU case law

The doctrine of civil liability based on EU law provisions has not been created suddenly. Step by step, the CJEU has made clear whether, who, and relative to whom, someone may be liable for an infringement of EU law. Such developments might even be expected to go further.[423]

One of the first important cases regarding EU law is the case *Van Gend & Loos v the Netherlands*. The case shows that individuals do not only derive obligations but also rights, directly from the EU Treaties. Van Gend & Loos imported goods from Germany to the Netherlands. The Dutch customs authorities charged a tariff on the import. Van Gend & Loos objected, submitting that the tariff was contrary to EU law.[424]

Van Gend & Loos paid the tariff but sought to recover the money in the national court afterwards. The national court made a request for a preliminary ruling to the CJEU, submitting the question whether (the predecessor of) Article 30 of the TFEU conferred rights on the nationals of a Member State. Rights that could be enforced in national courts.

According to the CJEU, Article 30 TFEU created personal rights for Van Gend & Loos, even though this was not expressly stated in the Article. According to the CJEU, based on Article 30, it was not allowed to impose a higher tariff.[425] The CJEU makes clear that the European Union constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals.[426] Independently of the legislation of Member States, Union law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[427] These rights arise not only where they are expressly granted by the EU treaties, but also by reason of obligations which the EU treaties impose in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Union.[428]

423. *Cf.* Wilman 2016, p. 935.
424. CJEU 5 February 1963 (*Van Gend & Loos v Netherlands*).
425. Ibid.
426. Ibid.
427. Ibid.
428. Ibid.

In fact, with this landmark case, the CJEU decided that the fact that the failure of Member States to comply with EU law could be supervised by individuals that act as enforcers in national courts.[429]

Liability under EU law originated with the case of *Francovich v Italy*.[430] The state of affairs before *Francovich v Italy* was that there was (arguably) authority for the position that the Member States were non-contractually liable under EU law.[431] However, the conditions of liability were to be provided by national law.[432]

In this case, Francovich alleged that Italy had not fulfilled its obligation to implement a directive before 23 October 1983 (i.e. to set up or designate a guarantee institution to ensure the payment of outstanding employee claims in the event of employer insolvency).[433] Francovich sought to rely on the rights provided by the directive and claimed that Italy was obliged to honour the guarantees provided for in the directive or alternatively pay compensation.[434]

Briefly stated, the CJEU held that the full effect of EU law would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of EU law for which a Member State can be held responsible.

One principle in the EU legal system is that a Member State is liable for damage caused to an individual as a result of breaches of EU law for which the Member State is responsible. A basis for a Member State's obligation to make good such damage is found in Article 4(3) of the TEU, under which Member States are required to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under EU law.[435] Among these obligations is the obligation to eliminate the consequences of a breach of EU law.[436]

In the case of *Francovich v Italy*, the CJEU limited the discussion to the situation of a Member State failing to fulfill its obligation to take all measures necessary to achieve the result prescribed by a directive. In this situation, according to the CJEU, three conditions must be fulfilled to ensure the effectiveness of the rights to be protected: (i) the result prescribed by the directive entails the granting of rights to individuals; (ii) the right is identifiable; and (iii) there must be a causal link between the breach of the Member State's obligation and the loss and damage suffered by the injured parties.[437]

429. CJEU 5 February 1963 (*Van Gend & Loos v Netherlands*).
430. CJEU 19 November 1991 (*Francovich and Others v Italian Republic*).
431. Bondi & Farley 2009, p. 11.
432. Ibid.
433. Ibid, pp. 13-14.
434. Ibid.
435. Wilman 2016, p. 891.
436. CJEU 19 November 1991 (*Francovich and Others v Italian Republic*), point 31; Wilman 2016, p. 897.
437. CJEU 19 November 1991 (*Francovich and Others v Italian Republic*), points 39-40; Beu 2012, p. 13; Bondi & Farley 2009, p. 16.

Although the action for damages would be dealt with in the context of national law, the conditions set have to be not less favorable than those relating to similar domestic claims and must not be framed so as to make it virtually impossible or excessively difficult to obtain reparation.[438] National law would then designate the competent courts and lay down the detailed procedural rules for legal proceedings. In *Francovich v Italy*, the CJEU found that the conditions relating to the breach of individual rights had been met, and the case was sent back to the Italian court to determine causality and the level of damages.[439] The case of *Francovich v Italy* and the conditions set for a civil claim against a Member State could be considered as providing guidelines for later civil litigation against a Member State.

The case *of Brasserie du Pêcheur v Germany* made clear that the application of this principle (i.e. that Member States are required to compensate individuals for loss and damage caused to the individuals as a result of breaches of EU law for which they can be held responsible) cannot be discarded if the breach relates to a provision of directly applicable EU law.[440] The principle is also applicable in this situation.

Brasserie du Pêcheur was a French company that claimed that it had been forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer produced by the French company did not comply with the purity requirement (*Reinheitsgebot*) laid down in the Biersteuergesetz of 14 March 1952, in the version dated 14 December 1976.[441]

The European Commission took the view that those provisions were contrary to Article 34 of the TFEU and brought infringement proceedings against Germany because of two laws, namely, the prohibition on marketing beers bearing the designation "Bier" lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in the case of *Commission* v *Germany*, the CJEU held that the prohibition on marketing beers imported from other Member States did not comply with the provisions in question, as it was incompatible with Article 34 of the TFEU.[442] *Brasserie du Pêcheur* consequently brought an action against Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1,800,000, representing a fraction of the loss actually incurred.[443]

In this case, the CJEU relied on the three conditions stated in *Francovich v Italy*.[444] However, the CJEU amended the conditions to some extent. The CJEU added that the breach had to be *sufficiently serious*. In its decision, the CJEU provided a framework for determining whether a breach is "sufficiently serious". The decisive test for determining whether a breach of EU law is *sufficiently serious* is whether the Member

438. CJEU 19 November 1991 (*Francovich and Others v Italian Republic*), point 43; Bondi & Farley 2009, p. 17.
439. Bondi & Farley 2009, p. 17.
440. CJEU 5 March 1996 (*Brasserie du Pêcheur SA v Germany*).
441. Ibid.
442. CJEU 12 March 1987 (*Commission v Germany*).
443. CJEU 5 March 1996 (*Brasserie du Pêcheur SA v Germany*).
444. *Cf.* Beu 2012, p. 13.

State concerned manifestly and gravely disregard the limits of its discretion. The factors that the court takes into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or EU authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by an EU institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to EU law.

The CJEU held that a breach of EU law is sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or if there is a preliminary ruling or settled case law of the court on the matter in which it is clear that the conduct in question constituted an infringement.

The case of *Dillenkofer v Germany* was decided shortly after the case of *Brasserie du Pêcheur v Germany.*[445] Dellinkofer (and others) were purchasers of package travel holidays who, following the insolvency in 1993 of the two operators from whom they had bought their packages, either never left for their destination or had to return from their holiday location at their own expense. They had not succeeded in obtaining reimbursement of the money paid to the operators or the expenses incurred to go back home. Dillenkofer claimed compensation and brought actions against Germany for the loss and damage suffered because the Directive had not been transposed within the prescribed period.[446] Dillenkofer based the claim on the ground that if Article 7 of the Directive had been transposed into German law within the prescribed period, i.e. by 31 December 1992, he would have been protected against the insolvency of the operators from whom they had purchased their package travel.

Germany and other Member States argued in particular that a Member State can incur liability for late transposition of a directive only if there is a serious (i.e. a manifest and grave) breach of EU law for which it is responsible. According to the Member States, this depends on the circumstances causing the failure to transpose the law within the period for transposition.

It appears that by using the condition mentioned in the case *of Brasserie du Pêcheur v Germany* (i.e. "sufficiently serious" breach), the Member States tried to find an exception to, and an escape from, liability for the late transposition of a directive. The CJEU rejected this point of view and made clear that, in substance, the conditions laid down in the two judgments of *Francovich v Italy* and *Brasserie du Pêcheur v Germany* were the same, since the condition that there should be a sufficiently serious breach, although not expressly stated in *Francovich v Italy*, was nevertheless evident from the circumstances of that case.
The CJEU ruled that the failure to take any measures to transpose a directive within the period laid down for that purpose constituted a serious breach of EU law per se and consequently gave rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of

445. CJEU 8 October 1996 (*Dillenkofer and Others v Germany*).
446. Directive on package travel, package holiday and package tours.

rights whose content is identifiable and a causal link exists between the breach of the Member State's obligation and the loss and damage suffered.

According to the above cases, individuals who have suffered damage have a right to reparation from a Member State if:[447]

i. the rule of law infringed must have been intended to confer rights on individuals;
ii. the breach must be sufficiently serious;
iii. the individual suffered damage; and
iv. there must be a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured parties.

After these cases, one of the further implications that had to be examined was whether the principle of state liability, as accepted in these cases, could be extended to situations where the malefactor was an individual.[448]

Whether an individual can claim compensation for a breach of European competition law has been long discussed, and a right to damages has actually been recognized in some of the Member States.[449]

Banks v British Coal Corporation was the first CJEU case where this issue arose.[450] The British Coal Corporation controlled coal reserves in the United Kingdom and had the power to authorize other companies to extract coal and to sell it to third parties, subject to a fixed amount payable to the British Coal Corporation.[451] Banks claimed that such a licensing agreement was in breach of competition provisions, and that it was entitled to compensation from the British Coal Corporation for excessive license fees and for the unreasonable low prices paid by the British Coal Corporation under the license/purchase agreement. The Advocate General strongly argued in favor of conferring on the claimant the right to bring an action for compensation before the national court.[452] The CJEU did not address the issue, as it held that the competition rules stated in Articles 65 and 66 of the European Coal and Steel Community Treaty were not directly applicable.[453]

A decade later the CJEU addressed the issue again in *Courage v Crehan*.[454]

447. Ambtenbrink & Vedder 2006, p. 263. *Cf.* Klinke 2005, p. 309; Ruhle & Lattenmeyer 2003, pp. 733-737. See for more information also Eijsbouts, Jans, Senden & Prechal 2010.
448. Bondi & Farley 2009, p. 72.
449. Ibid.
450. Ibid.
451. CJEU 13 April 1994 (*Banks & Co. Ltd v British Coal Corporation*).
452. Opinion Advocat General Van Gerven, 27 October 1993 in case: CJEU 13 April 1994 (*Banks & Co. Ltd v British Coal Corporation*).
453. CJEU 13 April 1994 (*Banks & Co. Ltd v British Coal Corporation*), points 15-19. See also Bondi & Farley 2009, p. 72.
454. Bondi & Farley 2009, p. 73.

3.2.3 Courage v Crehan

In *Courage v Crehan*, the core problem the EU judges had to address was not the existence in EU law of a right to bring antitrust damages actions, but to establish whether a party to a contract which violates competition law can be excluded from such actions related to that contract.[455] The legal problem the CJEU had to solve concerned essentially the limits to be imposed to the application of national procedural rules.[456]

However, in *Courage v Crehan* the CJEU acknowledged that private enforcement does exist under EU law, deriving it from the *effet utile* principle.[457] The CJEU recognized an action for damages under Article 101(1) of the TFEU to ensure the full effectiveness of the Article.[458] The CJEU made clear that a party to an anticompetitive agreement or practice, as well as a third party, may seek compensation for losses resulting from such agreement or practice.[459]

The case originated in an action brought by an English brewery, Courage, against Mr. Crehan, a publican, for the recovery of unpaid sums for deliveries of beer.[460] As a defense, Mr. Crehan raised the incompatibility of the contractual provisions relied upon by Courage with Article 101(1) of the TFEU. Furthermore, he counterclaimed for damages resulting from the excessive prices charged by Courage.[461] However, the difficulty for Mr Crehan was that his defense ran against to the English premise providing that a party to an illegal contract could not claim damages.[462]

Citing the cases of *Van Gend & Loos*,[463] *Costa Enel*[464] and *Frankovich*,[465] the CJEU held that EU law had created its own legal order, which was integrated into the legal systems of the Member States and which their courts were bound to apply. Just as it imposed burdens on individuals, EU law had also given rise to rights that had become part of their legal assets.[466] According to the CJEU, these rights arose not only where EU law expressly granted them, but also by virtue of obligations imposed by EU law in a clearly defined manner on all three: individuals, Member States and EU institutions.[467] The CJEU reminds that in the earlier case of *Eco Swiss*, it held that Article 101 of the TFEU constitutes a fundamental provision essential for the accomplishment of the tasks entrusted to the European Union and, in particular, for the functioning of the internal market.[468]

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455. Cisotta 2014, p. 85.
456. Ibid, p. 85.
457. Ibid, p. 88.
458. Ibid, p. 85.
459. See *inter alia* also Cisotta 2014, p. 84 et seq; Sieburgh 2014, p. 520 et seq.; Beu 2012, pp. 14 and 35 et seq.; Komninos 2002, p. 449 et seq; De Jong 2002; Harinxma 2002.
460. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 6.
461. Ibid.
462. Ibid, point 11.
463. CJEU 5 February 1963 (*Van Gend & Loos v Netherlands*).
464. CJEU 15 July 1964 (*Costa v E.N.E.L.*).
465. CJEU 19 November 1991 (*Francovich and Others v Italian Republic*), point 31.
466. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 19.
467. Ibid.
468. Ibid, point 20. See CJEU 1 June 1999 (*Eco Swiss China Time Ltd v Benetton International NV*), point 36.

The CJEU holds that, Articles 101 and 102 of the TFEU provide direct effects in the relations between individuals and created rights for the individuals concerned, which the national courts have to safeguard.[469] According to the CJEU, this means that any individual could rely on a breach of Article 101 of the TFEU before a national court even if that individual was a party to a contract that restricted or distorted competition within the meaning of the provision.[470]

The CJEU points out that, with regard to the possibility of seeking damages caused by a contract or by conduct liable to restrict or distort competition, it is settled case law[471] that the national courts whose task it is to apply EU legal provisions in areas within their jurisdiction have to ensure that those rules take full effect and have to protect the rights conferred on individuals.[472]

According to the CJEU, the full effectiveness of Article 101 of the TFEU and the practical effect of the prohibition laid down in Article 101(1) of the TFEU would be put at risk if it is not open to any individual to claim damages for loss caused by a contract or by conduct liable to restrict or distort competition.[473] The CJEU states that damages actions before the national courts could make a significant contribution to the maintenance of effective competition within the EU.[474] Despite the lack of a legal right for compensation under Article 101 TFEU, the CJEU explains that a right to damages does exist under EU law, deriving it from the *effet utile* principle.[475] To protect the maintenance of effective competition, the CJEU therefore concludes that there should not be any absolute bar to such an action being brought by a contractual party violating competition rules.[476]

The CJEU held that it was up to the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding the rights individuals derived directly from EU law, provided that such rules are not less favorable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult to exercise of rights conferred by EU law.[477] The CJEU precluded an absolute bar of claiming damages, but also stated that EU law did not preclude national law from denying a party who was found to bear *significant responsibility* for the distortion of competition the right to obtain damages from another contracting party.[478]

469. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 23; CJEU 27 March 1974 (*BRT v SV SABAM and NV Fonior*), point 16; and CJEU 18 March 1997 (*Guérin automobiles v European Commission*), point 39.
470. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 24.
471. *Inter alia* CJEU 9 March 1978 (*Italy v Simmenthal SpA*), point 16; and CJEU 19 June 1990 (*The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*), point 19.
472. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 25.
473. Ibid, point 26.
474. Ibid, point 27.
475. *Cf.* Cisotta 2014, p. 88.
476. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 28.
477. Ibid, point 29.
478. Ibid, point 31.

The CJEU reminds that EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Union law does not entail the unjust enrichment of those who enjoy them.[479] In line with the earlier case of *Commission v Italy*,[480] EU law also does not prevent national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party, where this is proven.[481] Hence, EU law does not preclude a rule of national law from barring a party to a contract (restricting or distorting competition) from relying on that party's own unlawful actions to obtain damages if it was established that that party bore *significant responsibility* for the distortion of competition.[482]

To assess if an undertaking bears such a 'significant responsibility' for the distortion of competition — and can therefore be barred from bringing an action for damages — the matters to be taken into account by the national court have to include the economic context and the respective bargaining power and conduct of the two parties to the contract.[483] The markedly weaker position could, for example, exist because there is only a reduced or absent freedom to negotiate the terms of the contract and capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the real remedies available to the markedly weaker party.[484] *Van Bael* and *Bellis* indicated that difficulty may arise in determining whether a party bears such "significant responsibility".[485] *Van Bael* and *Bellis,* for instance, mention that it would be inappropriate for a party to a price-fixing cartel to be entitled to damages for the loss of clients suffered as a result of the excessive sale price it had to charge on the basis of the anti-competitive agreement reached within the cartel.[486] Monti is even more critical about the decision. He argues that Article 101 of the TFEU should protect third parties, not the parties to the contract.[487] Providing such a right of damages to parties to the anticompetitive agreement does not make a significant contribution to the maintenance of effective competition in the Union.[488] Placing private enforcement in the hands of parties to an anticompetitive agreement is not the way of increasing private enforcement in the public interest.[489] He even concludes that the possibility to claim for damages for parties to the anticompetitive agreement could lead to further anticompetitive effects and be at the cost of consumer welfare.[490] In addition it could give an extra responsibility for the stronger party to the contract which could be used by the other party.

479. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 30.
480. CJEU 7 February 1973 (*Commission v Italy*), point 10.
481. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 31.
482. Ibid, point 36.
483. Ibid, point 32. See also Cisotta 2014, p. 86.
484. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), points 33 and 34. See also Cisotta 2014, p. 87.
485. Van Bael & Bellis 2010, p. 1222 et seq.
486. Ibid.
487. Monti 2002, p. 297.
488. Ibid, p. 286.
489. Ibid, p. 301.
490. Ibid, p. 287.

According to Monti, parties to such agreements should ideally be barred from seeking damages and the Courage case should be overruled.[491]

The judgment shows that any individual can claim damages suffered as a result of a competition law infringement. There was a long legal road, including a standard appeal of the *effet utile* principle needed to come to this outcome. First, it had to be clear that individuals were entitled to rely on EU law directly. Moreover, it was necessary that liability can result from infringements of EU law. This was already obvious for Member States. It also became clear that national courts are responsible to test this. With this, every individual should be able to claim damages caused by EU competition law infringements. The CJEU makes clear that Member States are not allowed to have rules that prevent damages claims per se. It is however allowed that Member States apply rules by which contracting parties cannot claim for damages if they bear a significant responsibility for the distortion of competition.

The critical observations of Monti are interesting to read. At the same time, the question is whether the critique is not overstrained. Most importantly, the CJEU is critical about English law, because it systematically denies a party to an agreement the possibility of relying on (invalidity and) claiming damages, as it is not in accordance with Article 101 TFEU.[492] The CJEU does not prohibit Member States to apply rules that prevent parties to claim for damages if they have significant responsibility for the distortion of competition. As the CJEU reminds, it is even common in the Member States to have rules preventing litigants profiting from their own unlawful conduct. Indeed, the CJEU has applied such a rule in the past.[493]

According to the author, all parties to the contract have often a significant responsibility to prevent the distortion of competition. Therefore, the author assumes that in practice, parties to the anticompetitive contract will often not be successful in claiming for damages. It is only for those specific cases, where the other party is in such a weak position, given the examples by the CJEU — almost comparable with a third party not involved in the creation of the anticompetitive agreement at all — that it should be allowed to claim for damages. Cissota notes that the decision in Crehan has been inspired by the need to establish in contractual relationships a kind of fairness.[494] It is likely that some kind of fairness is indeed involved, which is no stranger in the midst of civil law systems. More importantly however is that providing an extra incentive for preventing parties from entering into agreements with anticompetitive provisions, provides in my opinion a better protecting of the maintenance of effective competition. It is likely that the risk of damages claims as such have a deterrent effect. It strengthens the functioning of the Union competition rules and discourages acting contrary to them.[495]

491. Monti 2002, p. 301.
492. Sieburgh 2014, p. 522.
493. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 31.
494. Cissota 2014, p. 87.
495. Sieburgh 2014, p. 520.

3.2.4 **Manfredi**

The next case interpreting Article 101 of the TFEU and private enforcement in the EU legal framework originates in an action brought by Vincenzo Manfredi *et al.* against some insurance companies.[496] Manfredi's aim was to obtain an order against cartel infringing insurance companies for the repayment of the increase in the cost of premiums for compulsory civil liability insurance relating to accidents caused by motor vehicles, vessels and mopeds paid under an agreement between the insurance companies that had been declared unlawful by the national competition authority.

In the *Manfredi* case, the applicants brought their respective actions before the court (*Giudice di pace di Bitonto*) to obtain damages against several insurance companies for the increase in the cost of premiums paid by reason of a cartel declared unlawful by the Italian national competition authority.[497] The insurance companies pleaded, *inter alia*, that the court did not have jurisdiction and that the right to restitution and/or compensation was barred because the limitation period had expired. In addition, it was questioned whether Article 101 of the TFEU was applicable in a case in which the cartel only pertained to the Italian insurance market.

The CJEU stated that an agreement of concerted practice between insurance companies consisting of a mutual exchange of information that made an increase in premiums possible, which was not justified by market conditions, and which infringed national rules on the protection of competition, also constituted an infringement of Article 101 of the TFEU if, in the light of the characteristics of the national market at issue, there was a sufficient degree of probability that the agreement or concerted practice would possibly have an influence, direct or indirect, actual or potential, on the sale of those insurance policies in the relevant Member State by operators established in other Member States, and that that influence was not insignificant.[498]

The second issue was whether Article 101 of the TFEU was to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice under that article and, if there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm.

The CJEU stated that it was settled case law that the principle of invalidity could be relied on by anyone, and that courts were bound by it once the conditions for the application of Article 101 of the TFEU were met and as long as the agreement concerned did not justify the grant of an exception under Article 101(3) of the TFEU. The invalidity of Article 101(2) of the TFEU was absolute. An agreement void by virtue of this provision had no effect between the contracting parties and could not be invoked against third parties.[499] In addition, Article 101(1) of the TFEU produces direct effects between individuals and creates rights for the individuals

496. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*).
497. Ibid, point 13.
498. Ibid, point 52.
499. Ibid, point 57.

concerned, which the national courts have to safeguard.[500] According to the CJEU, it means that any individual could rely on a breach of Article 101 of the TFEU before a national court and therefore could rely on the invalidity of an agreement or practice prohibited under that article.[501]

The CJEU further recalled that the full effectiveness of Article 101(1) of the TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) of the TFEU would be put at risk if it were not open to any individual to claim damages caused to him by a contract or by conduct that restricted or distorted competition.[502] From this standpoint, it is obvious that if there is a causal relationship between the harm and the infringement under Article 101 of the TFEU, any individual can claim compensation for the harm suffered.

The CJEU held that in the absence of EU rules governing compensation for harm caused by an agreement practice prohibited under Article 101 of the TFEU, it is up to the domestic legal system of each Member State to designate the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive directly from EU law, provided that such rules are not less favorable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness).[503] Hence, in the absence of EU law governing the matter, it is for the domestic legal system of each Member State to prescribe the details governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed.[504]

The next question of the Italian court was whether Article 101 of the TFEU precluded a national provision under which third parties had to bring their damages actions for infringement of EU and national competition rules before a court different from the one that usually has standing in actions for damages or similar value. The national provision involves a considerable increase in cost and time. The CJEU made clear that, in the absence of EU rules governing the matter, it is up to the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction in relation to private enforcement in competition law, provided that the provisions concerned are not less favorable than the national competition rules and in addition, that national provisions do not render practically impossible the exercise of the right to seek compensation under Article 101(1) of the TFEU.[505]

Another question was whether Article 101 of the TFEU precluded a national rule providing that the limitation period for seeking compensation under Article 101 of the TFEU starts running on the same day on which that prohibited agreement

500. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 58.
501. Ibid, point 24.
502. Ibid, point 39 et seq.
503. Ibid, point 62.
504. Ibid, point 64.
505. Ibid, point 72.

or practice was adopted.[506] As the CJEU pointed out, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed civil procedural rules for safeguarding EU legal rights, provided that such rules observe the principles of equivalence and effectiveness.[507]

A national rule providing that the limitation period starts running on the same day as the infringement could make it practically impossible to exercise the right to seek compensation for the harm caused by that infringement. This problem becomes even greater when the national rule also imposes a short limitation period that cannot be suspended.[508] With such a rule, it is possible for the limitation period to expire even before the infringement is brought to an end. That would make it impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.[509] According to the CJEU, it is up to the national court to determine whether a national rule on a limitation period for compensation claims makes it practically impossible to exercise the right to seek compensation for the harm caused by the infringement.

The last question of the Italian court was whether Article 101 of the TFEU required national courts to award punitive damages greater than the advantage obtained by the offending operator. Those punitive damages would be an instrument in deterring infringements of Article 101 of the TFEU.[510]

The CJEU stated that the EU rules take full effect and protect the rights conferred on individuals.[511] According to the CJEU, the full effectiveness of Article 101 of the TFEU and, in particular, the practical effect of Article 101(1) of the TFEU would be at risk if it was not open to every individual to claim damages for loss caused by an infringement of competition law.[512] The CJEU stated that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.[513] It ruled that the Member States had to set the criteria for determining the extent of the damages, whether punitive or not, provided that the principles of equivalence and effectiveness were observed.[514] In accordance with the principle of equivalence, it had to be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on EU competition rules if it was possible for such damages to be awarded pursuant to similar actions founded on domestic law.[515] However, as already stated in *Courage v Crehan*, EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.[516] In general, the CJEU holds that in accordance

506. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 73.
507. Ibid, point 77.
508. Ibid, point 78.
509. Ibid, point 79.
510. Ibid, point 83.
511. Ibid, point 89.
512. Ibid, point 90.
513. Ibid, point 91.
514. Ibid, point 92.
515. Ibid, point 93.
516. Ibid, point 94. See CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 30.

with the principle of effectiveness, persons affected by infringements must be able to seek compensation for the actual loss (*demnum emergens*) and for loss of profit (*lucrum cessans*) plus interest.[517]

3.2.5 EU v Otis NV

As stated in Chapter 2, the administrative competition procedure in which the European Commission is investigator, prosecutor and decision-maker, is frequently exposed to criticism.[518] In the *Otis* case it was objected that the European Commission was representing the EU in a civil action for damages as well against members of an elevator cartel (as private enforcer). That is, against cartel members that the European Commission had itself previously fined.

In 2007, the European Commission fined producers of elevators and escalators for a cartel infringement. The European Commission imposed nearly EUR 1 billion worth of fines. In the same year, the European Commission also lodged a follow-on damages action on behalf of the EU in the Belgian courts alleging to have lost around EUR 7 million resulting from the cartel.[519] These losses had allegedly occurred as a result of the EU having awarded contracts for the supply and installation of elevators and escalators for their buildings to some of the cartel members, including Otis.[520]

Otis argued that the European Commission acting as private enforcer should be considered as a violation of due process rights.[521] First of all, the fact that the European Commission's public enforcement fining decision itself enjoyed "binding legal effects"[522] on the domestic court as regards the finding of an infringement, allowed the European Commission to act as "judge in its own cause".[523] The referring court wishes to ascertain whether, in the context of such an action, the European Commission is not both judge and party in its own cause in breach of the *nemo judex in sua causa* principle.[524] Moreover, the fact that the European Commission was also involved in the public procedure should prevent the European Commission from being allowed to act as the private enforcer as well. Otis argued that the European Commission already acted in the public procedure, received (confidential information) and made all kind of decisions about prosecuting the parties to the investigation. The European Commission, as private enforcer, should therefore be considered in violation of the principle of "equality of arms".

The CJEU reminds that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or

517. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 95.
518. See *inter alia* Beumer 2013 (1), p. 7. See also Section 2.3.6.
519. Andreangeli 2014, p. 717.
520. Ibid.
521. Cisotta 2014, p. 91.
522. According to Article 16 of Regulation 1/2003.
523. Andreangeli 2014, p. 717.
524. CJEU 6 November 2012 (*EU v Otis NV and Others*), point 39.

practice prohibited under Article 101(1) TFEU.[525] It means that the EU also enjoys that right.[526]

However, the CJEU also makes clear that when that right is exercised the fundamental rights of the defendants, as safeguarded, *inter alia*, by the Charter of Fundamental Rights of the European Union must be observed.[527]

The CJEU concludes that there is no violation of the *nemo judex in sua causa* principle. EU law provides for a system of judicial review of European Commission decisions related to proceedings under Article 101 TFEU, which affords all the safeguards required by Article 47 of the Charter.[528] The CJEU notes that the defendants in the main proceedings, to whom the decision had been addressed, did bring actions for the annulment of that decision (in the administrative procedure).[529] The review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality, supplemented by the unlimited jurisdiction in respect of the amount of the fine, therefore meets the requirements of the principle of effective judicial protection.[530] Moreover, the CJEU notes that it is still up to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation 1/2003.[531] In addition, the CJEU concludes that there is no violation of the principle of equality of arms. When preparing the action in the main proceedings, the European Commission only used information in the public version of the decision of 27 February 2007. For that reason, the Commission is on an equal footing with every other litigant.[532] In addition, the CJEU notes that EU law contains a sufficient number of safeguards to ensure observance of the principle of equality of arms.[533]

This judgment has been criticized by several legal scholars.[534] Doubts were expressed whether the CJEU decision does justice to the rights of due process. It is questioned why the CJEU does not explicitly consider Article 6 ECHR and the case law of the European Court of Human Rights in its assessment.[535] Attention is paid to the limited review of European judges of the European Commission decisions. Beumer holds that it is unclear whether such an assessment of the decision is the same as a "thorough appreciation of the facts". If this is not the case, the 'legal control' by

525. CJEU 6 November 2012 (*EU v Otis NV and Others*), point 43.
526. Ibid, point 44.
527. Ibid, point 45.
528. Ibid, point 56.
529. Ibid, point 57.
530. Ibid, point 63.
531. Ibid, point 66.
532. Ibid, point 73.
533. Ibid, point 75.
534. See *inter alia* Beumer 2013 (1); Andreangeli (Andreangeli 2014) and Cisotta (Cisotta 2014) appear less critical.
535. Beumer 2013 (1), pp. 10-11.

the European judges of the European Commission decisions may not meet the requirements of the ECHR.[536]

In addition, the question is raised whether, by only using a non-confidential version of the European Commission's decision in the civil proceedings, the principle of equality of arms is respected sufficiently. Beumer notes in this context that also if the European Commission only uses a non-confidential version of its own decision in the civil procedure, the principle of equality of arms can be violated.[537] On the basis of the theory of "doctrine of appearance" an objective and abstract imbalance may be sufficient to establish a violation of the principle of equality of arms.[538]

Even for those who are not convinced by these doubts, the question could be raised (from a policy perspective) whether it is desirable that the institution that already is the investigator, prosecutor and decision-maker on behalf of the EU also acts as private enforcer. Parties involved could have more doubts about the motives and conduct of the European Commission. It is not ruled out that this potentially affects the attractiveness and effectiveness of the leniency policy, and hence the effectiveness of competition law as a whole.[539] Because of the role of the European Commission in the public enforcement case, handling the follow-on damages case as well, is at least unfortunate. Of course, it should be noted that the case is eccentric. The discussion only arose because the cartel also had an (alleged) impact on the EU itself. To avoid indistinctness, confusion and distrust, it would make sense to entrust another institution of the EU with the important task of private enforcer, when such specific circumstances occur.

3.2.6 **Kone AG and Others v ÖBB-Infrastruktur AG**

In *Kone AG and Others v ÖBB-Infrastruktur AG,* ÖBB-Infrastruktur claims that part of its loss was caused by the cartel at issue, which made it possible to maintain a market price at such a high level that even competitors not party to the cartel were able to benefit from a market price that was higher than without the existence of that cartel, whether in terms of profit margin, or simply of survival, if their cost structure was such that normal conditions of competition resulted in their removal from the market.[540] Under Austrian law it is difficult to receive compensation under such circumstances if a contractual link with the cartel infringers is missing.[541]

The CJEU notes that the market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services.[542] When a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, e.g. the nature of the goods or the size of the market covered by that cartel, it cannot be ruled out that a competing

536. Beumer 2013 (1), pp. 11-12.
537. Ibid, p. 12. *Cf.* Andreangeli 2014, p. 732.
538. Beumer 2013 (1), p. 12.
539. *Cf.* Section 2.3.6.
540. CJEU 5 June 2014 (*Kone AG and Others v ÖBB-Infrastruktur AG*), point 27.
541. Ibid, point 31.
542. Ibid, point 29.

undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, i.e. in the absence of that cartel.[543] In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must nonetheless be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel.[544]

The CJEU reminds that the Member States must ensure that European Union competition law is fully effective and therefore national legislation must specifically take into account the objective pursued by Article 101 TFEU, which aims to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition.[545] In those circumstances, the CJEU holds that national legislation must recognize the right of any individual to claim compensation for loss sustained.[546]

Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.[547] It is for the referring court to determine whether those conditions are satisfied.[548]

The cartel infringers run the defense that such damages are likely to dissuade the undertakings concerned from assisting the competition authorities to investigate cases, which would run contrary to the principle of effectiveness.[549] The CJEU reminds that the leniency programme is a programme developed by the European Commission, through its Notice on Immunity from fines and reduction of fines in cartel cases, which has no legislative force and is not binding on Member States. Consequently, that leniency programme can also not deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU.[550]

The CJEU elaborates that Article 101 TFEU must be interpreted as meaning that it precludes legislation which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, set its prices higher than would otherwise have been expected under competitive conditions.[551]

543. CJEU 5 June 2014 (*Kone AG and Others v ÖBB-Infrastruktur AG*), point 29.
544. Ibid.
545. Ibid, point 32.
546. Ibid.
547. Ibid, point 34.
548. Ibid.
549. Ibid, point 36.
550. Ibid.
551. Ibid, point 37.

In line with the earlier cases *Courage v Crehan* and *Manfredi*, the CJEU indicated that specific provisions of national law that implicate an absolute ban on EU competition law damages actions affect the effective functioning of EU competition law and are therefore not allowed.

The *Kone* case gives substance to what is meant by "everyone should be able to claim for damages". The umbrella effect doctrine shows that the pool of subjects that may recover damages from cartelists is very wide and shows that the potential liability could be very comprehensive.

3.2.7 Interim Conclusion

The case law shows that EU competition law intervenes directly in the national civil law of the Member States. Hence, specifically with respect to a particular type of violation (competition law infringements), there is a special regime that affects domestic civil law and the relation between individuals in the Member States. That is a far-reaching consequence, bearing in mind that a right to compensation is not explicitly included in the Articles 101 and 102 of the TFEU. At the same time, competition law is one of the special areas where EU law is aimed at specifically, with direct consequences between individuals. Already from the fact that also the nullity of the contract results from an EU competition law infringement, shows that EU competition law goes beyond the public side of enforcement only.

With *Courage v Crehan*, the CJEU made clear that Article of the 101 TFEU has direct horizontal effect and that other private law consequences (others than nullity) are also possible.[552] Prior case law already showed that Member states could be held liable, but — as a logical next step — it became clear that other subjects (individuals) could also be held liable. It is clear that if a direct horizontal effect is recognized under EU law, the "non-compliant-individual" could be held responsible for the harm resulting from the non-compliance.[553]

It became clear from the cases of *Courage v Crehan* and *Manfredi*, as well as later cases like *Bkart v Pfleiderer*,[554] *Bundeswettbewerbsbehorde v Donau Chemie*,[555] *European Union v Otis and others*[556] and *Kone v ÖBB-Infrastruktur*[557] that the CJEU has established a legal basis for private enforcement in Article 101 and Article 102 of the TFEU. According to the CJEU this is based on the principle of effectiveness, even though a damages provision is not explicitly stated in the TFEU itself. The CJEU has clarified that if rights holders were not able to claim compensation for competition law infringements, Articles 101 and 102 of the TFEU would not have full effect. According to the CJEU, it is up to the Member States to secure this right in order to be used effectively by the victims. Member States should prevent it from being practically

552. Hartkamp, Sieburgh & Devroe 2017, pp. 4-5.
553. *Cf.* Hartkamp, Sieburgh & Devroe 2017, pp. 4, 5 and 105 et seq.
554. CJEU 14 June 2011 (*Pfleiderer AG v BkartA*), point 28.
555. CJEU 6 June 2013 (*Bundeswettbewerbsbehörde v Donau Chemie et al.*), point 21.
556. CJEU 6 November 2012 (*EU v Otis NV and Others*), point 41.
557. CJEU 5 June 2014 (*Kone AG and Others v ÖBB-Infrastruktur AG*), point 21.

impossible to exercise the right to seek compensation for the harm caused by that infringement.

The case *Courage v Crehan* made it clear that everyone who suffered harm caused by an EU competition law infringement can claim for damages, even parties to the anticompetitive contract. It is up to the national courts to safeguard this right.[558] There could be an exclusion for the right on compensation if the claiming party would be unjustifiably enriched. In circumstances in which the party was one of the EU competition law infringing parties, claiming for damages could be prevented under certain conditions. In the cases that followed, the CJEU explicitly held that third parties are able to claim for damages if a causal link between the damage and the infringement exists.[559] Necessary conditions to claim for damages are that an EU law infringement is established, damages can be showed and that there is a causal relationship between the infringement and the damages. From the *Manfredi* case, it also became clear what the harm consists of. The CJEU considers harm to be the actual loss, loss of profit and the interest. It does not matter whether the victim is a direct victim in the supply chain, an indirect victim in the supply chain, the EU itself, or a victim that suffered harm in another way, for example, via umbrella sales.[560]

3.2.8 Ashurst Comparative Report

Pursuant to a tender carried out by the European Commission, law firm Ashurst compared the conditions for bringing claims for infringements of EU competition rules in 2004.
The aim of this study (called the "Ashurst Comparative Report")[561] was to provide a comparative analysis of the national rules and case law regarding the enforcement of European competition rules and, in the absence thereof, the national competition rules in the courts of Member States.[562] The goal was (i) to take stock and gather information on the *status quo* of claims for damages for breach of competition law in the Member States, (ii) to conduct a comparative analysis of that data; and (iii) to find ways for more effective enforcement at the level of the individual Member States and at the European level.[563]

In summary, the Ashurst Comparative Report concluded that there was only a very small amount of such litigation. The study found that not only was there a lack of development of actions for damages for breach of European competition law, but there was also "astonishing diversity" in the approaches taken by the Member States.[564] The study concluded *inter alia* that the rules of the various Member States

558. Sieburgh 2014, p. 520.
559. See also Beu 2012, p. 39.
560. CJEU 5 June 2014 (*Kone AG and Others v ÖBB-Infrastruktur AG*).
561. Waelbroeck, Slater & Even-Shoshan 2004.
562. Countries like Romania and Bulgaria were not taken into consideration in the comparative approach of the Ashurst Comparative Report. The countries became EU members after 2004.
563. Waelbroeck, Slater & Even-Shoshan 2004, pp. 26-27.
564. It identified only a very limited number of successful damages awards for breach of EU competition rules since 1962. The Ashurst Comparative Report also established that there has been a similarly limited number of damages awards under national competition law. See in: European Commission 2005 (Annex to the Green Paper on Damages Actions), p. 12.

differ to a large extent, including on the statutory basis, the standing of victims, the rules of evidence, the rules on discovery, proving damage, limitation periods, procedural costs, and proving causation.

3.2.9 The Green Paper and Commission Staff Working Paper

3.2.9.1 *Introduction*

The European Commission assumes that hardcore cartels cost consumers and other victims in the EU between 25 billion and 69 billion euros per year.[565] Based on these observations, the European Commission concluded that, where hardcore cartels are concerned, much harm is left uncompensated.[566] According to the European Commission, this is attributable to shortcomings in the laws relating to antitrust damages in the various Member States — referring to the Ashurst Comparative Report that also made clear that the rules in the various Member States differ vastly.[567]

After the Ashurst Comparative Report, the European Commission published a green paper as a discussion document, which was intended to stimulate debate and launch a consultation process at the European level regarding private enforcement. As consultation paper a green paper presents a range of ideas and invites interested individuals or organizations to contribute with their views and information. A green paper is often followed by a white paper, an official set of proposals that is used as a vehicle for their development into law.

In the green paper called "*Damages actions for breach of the EC Antitrust rules*" ("Green Paper") and the Commission staff working paper attached to it, the European Commission addressed the conditions for bringing damages claims for infringements of European competition law. The two papers identify several obstacles to a more successful and efficient system.[568] The European Commission wants to facilitate damages claims in order to make it easier for consumers and undertakings to obtain compensation for their loss and damage.[569] In addition, the European Commission aimed to strengthen the enforcement of competition law as such.[570]

3.2.9.2 *Background and Objectives of the Green Paper*

The competition rules in Articles 101 and 102 of the TFEU are enforced by both public and private instruments.[571] Under Regulation 1/2003, the European Commission and national competition authorities are responsible for public enforcement of the applicable EU competition law. With regard to public enforcement, both

565. See *inter alia* Kortmann & Swaak 2009, p. 341.
566. Ibid.
567. European Commission 2008 (Impact Assessment Report), p. 12.
568. European Commission 2005 (Green Paper on Damages Actions), p. 3.
569. Ibid.
570. Ibid.
571. Ibid.

the European Commission and the competition authorities of the Member States apply European competition law in individual cases.

According to the European Commission, it is fundamental to the idea of private damages actions that the victim of a legal violation must be entitled to compensation for the loss suffered as a result of the violation in question.[572] Private enforcement in this context means application of competition law in civil disputes before national courts.[573] Such an application can take different forms. Pursuant to Article 101(2) of the TFEU, agreements or decisions prohibited by Article 101 of the TFEU are void. European competition law could also be used in actions for injunctive relief.[574] Moreover, damages awards can be awarded to those who have suffered a loss caused by an infringement of the competition rules.[575] The Green Paper focuses solely on damages actions.

According to the European Commission, damages actions serve two purposes. First, they compensate those who have suffered a loss as a consequence of anti-competitive behavior. Second, they ensure the full effectiveness of the competition rules by discouraging anti-competitive behavior, hence contributing to the maintenance of effective competition in the EU (deterrence).[576] For these objectives, EU law demands an effective system for claiming damages for infringements of competition rules.

The purpose of the Green Paper and Commission Staff Working Paper is to identify the main obstacles to a more efficient system for bringing damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions (i.e. cases in which the civil action is brought after a competition authority has found an infringement) and for stand-alone actions (i.e. cases not following on from a prior finding by a competition authority about a competition law infringement).[577]

In the Green Paper, the main issues are summed up. These issues are dealt with in greater detail in the Staff Working Paper. All interested parties were invited to study the considerations put forward in the papers. The European Commission invited all interested parties to comment on the issues discussed, and the options provided regarding, amongst others: (i) access to evidence; (ii) fault requirement; (iii) damages; (iv) the passing-on defense; (v) defending consumer interests; (vi) litigation costs; (vii) coordination of public and private enforcement; (viii) jurisdiction and applicable law; and (ix) other issues.

The comments should assist the European Commission in deciding whether measures should be taken at the EU level to improve the conditions for competition damages claims, and if so, which measures. The European Commission wanted to

572. European Commission 2005 (Annex to the Green Paper on Damages Actions), p. 6.
573. European Commission 2005 (Green Paper on Damages Actions), p. 3.
574. See for more information Wilman 2016, pp. 909-913.
575. Wilman 2016, pp. 909-913.
576. See *inter alia* Kroes 2005 (1); Kroes 2005 (2); Kroes 2006 (1), pp. 2-4; and Kroes 2006 (2), p. 4.
577. European Commission 2005 (Green Paper on Damages Actions), p. 4.

use the debate to find ways to better compensate for antitrust injuries and increase deterrence.[578] It noted that the ultimate objective of the European Commission was to foster competition, not a litigation culture.[579]

3.2.9.3 *Coordination of Public and Private Enforcement*

One of the issues the European Commission paid attention to in the Green Paper is that public and private enforcement should complement each other and that they should therefore be coordinated in an optimal way.[580] Decisions by competition authorities could have a significant impact on the actual possibilities of claimants to prove their case.[581] According to the European Commission, optimal coordination between private and public enforcement is especially important for the coordination between leniency applications in public enforcement and damages claims.[582] Both leniency programmes and civil liability contribute by their effects to the same aim: more effective deterrence from entering into cartels.[583] In the European Commission's opinion, consideration should therefore be given to the impact of damages claims on the operation of leniency programmes so as to preserve the effectiveness of the programmes.[584] In this respect, it should be taken into account that the successful operation of leniency programmes is generally helpful for private litigants in damages actions, as leniency programmes uncover secret cartels.[585]

In its Staff Working Paper, the European Commission also pays attention to the potential negative signals. It has been argued that the prospect of damages claims could constitute a disincentive for leniency applicants and thus exercise a negative effect on public enforcement in the field of cartel fighting.[586] Although some negative effect is certainly not to be excluded,[587] the existence of a negative effect is by no means certain according to the European Commission.[588] Today, a cartel participant is already exposed to civil liability and would not want to forgo the opportunity to at least reduce its liability to pay fines (especially when some other cartel participant may at any time choose to apply for leniency). In this situation, the potential applicant would be exposed to both fines and civil damages.[589] In her speech in New York on 22 September 2005, just before the final Green Paper was published, Kroes stated:[590]

> "*First on the interaction between public and private enforcement. Being a public enforcer of competition rules myself, you will not be surprised to hear that I would*

578. European Commission 2005 (Annex to the Green Paper on Damages Actions), p. 8.
579. Ibid.
580. European Commission 2005 (Green Paper on Damages Actions), p. 9.
581. Ibid.
582. European Commission 2005 (Green Paper on Damages Actions).
583. Ibid.
584. Ibid.
585. Ibid.
586. European Commission 2005 (Annex to the Green Paper on Damages Actions), p. 64 et seq.
587. Ibid.
588. Ibid.
589. Ibid.
590. Kroes 2005 (1), pp. 3-4.

> *not like the key role played by public antitrust enforcement to be weakened by private actions.*
>
> *I am convinced though, that more private enforcement does not equal less public enforcement.*
>
> *Rather on the contrary: my spontaneous feeling is that private enforcement is by nature complementary to, and even strengthens the enforcement actions taken by competition authorities.*
>
> *Some may wonder whether my plea for more private antitrust enforcement in Europe can be reconciled with my desire to uphold or even strengthen the efficiency of the European leniency programmes.*
>
> *Well, I frankly do not see how the obligation to compensate the victims of an antitrust infringement could have a chilling effect on the leniency programmes of the European competition authorities.*
>
> *Quite the opposite! A balanced private antitrust enforcement system should become a real incentive for leniency applications.*"

It seems from the above that at that time the European Commission did not fear the negative side effects of private enforcement and felt that an upcoming private enforcement would not outweigh the effectiveness of the leniency programme. However, the Staff Working Paper pays attention to this possible negative side effect. According to the Staff Working Paper, any measure optimizing the combined deterrent effect of both leniency programmes and private enforcement should be considered.[591] In its Green Paper the European Commission provides three options to ensure that leniency programmes and the rules on damages claims are coordinated in a way that ensures the underlying aims are optimally achieved:[592]

i. exclude the discoverability of the leniency application;
ii. provide a leniency applicant with a rebate on a damages claim; and
iii. remove joint liability for the leniency applicant.

In its comments on the Green Paper, Member State Austria makes clear that its legal system meets the standards as provided in *Courage v Crehan* by the CJEU already.[593] Its legislation regarding civil damages and its civil procedural rules are already compliant with the standards.[594] Moreover, the Austrian federal government notes that the EU has no competence for the harmonization of legislation regarding civil damages and civil procedural rules.[595] The Austrian federal government warns

591. European Commission 2005 (Annex to the Green Paper on Damages Actions), p. 64 et seq.
592. Ibid, pp. 65-66.
593. Austrian Federal Ministry of Justice and Federal Ministry of Economics and Labour 2006.
594. Ibid.
595. Ibid.

that all Member States feature a mature system regarding civil damages in which the EU should not carelessly intervene.[596]

With respect to balancing public enforcement and private enforcement, the Austrian Government states that an incentive for applying for leniency will be reduced if more private enforcement takes place. Therefore, information that the authorities received due to a voluntary cooperation of a cartel member should be protected from disclosure.[597]

Germany also holds that there is no need for a new pan-European framework.[598] According to the German federal government, the starting point for all consideration should be the principle of subsidiarity.[599] While uniform substantive standards for competition law are necessary in the internal market, the enforcement of damages claims is to a large extent governed by the general legal provisions of the Member States.[600] According to the German federal government these differ from one another fundamentally in many respects.[601] The German federal government reminds that even the case law of the CJEU assumes that the modalities of private damages claims are governed by the domestic law of the Member States.[602] There should only be deviation from this when a specific need is shown, for example, to avoid serious differences in the internal market.[603] However, national efforts of the Member States have first priority.[604] In the opinion of the German federal government only specific antitrust law rules should be enacted to the extent absolutely necessary in regard to relevant characteristics.[605] In so doing, contradictory valuations in relation to the general rules for civil law disputes should be avoided.[606] For example, the German federal government mentions that it would not be justified to deviate from generally applicable rules regarding access to evidence and to establish special rules for the disclosure of documentary evidence particularly in the area of antitrust law.[607] Moreover, the German federal government notes that the necessary rules for the disclosure of evidence — which under German law above all encompasses the production of documents — should remain reserved to national law.[608]

In terms of finding the right balance between public and private enforcement, the German government holds that public and private enforcement of competition law should be coordinated in such a way that the functionality and attractiveness of leniency applications should be affected to the least extent possible.[609] This in-

596. Austrian Federal Ministry of Justice and Federal Ministry of Economics and Labour 2006.
597. Ibid.
598. German Federal Ministry of Economics and Technology and the Federal Cartel Office 2006.
599. Ibid.
600. Ibid.
601. Ibid.
602. Ibid.
603. Ibid.
604. Ibid.
605. Ibid.
606. Ibid.
607. Ibid.
608. Ibid.
609. Ibid.

cludes protecting the confidentiality of such applications and the information connected thereto.[610] Through the disclosure of the antitrust violation the leniency applicant should not be additionally burdened and subject to a larger risk of damage compensation than other participants in the anti-competitive behavior.[611]

The German government believes that the suggested instruments could significantly reduce the attractiveness of leniency applications if potential applicants saw themselves as being subject to the danger of multiple damage compensation claims or far-reaching civil procedure law obligations to produce evidence.[612] According to the German federal government, the suggestion to reduce or limit the obligation to pay damages compensation and remove the joint and several liability of the leniency applicant would create several problems.[613] The extent to which preferential treatment of the leniency applicant is justified as compared to other infringing parties, and how this can be carried out when necessary, can only be sensibly decided within the framework of the applicable national law.[614]

The Danish government appears more positive about the pan-European approach to assist competition law victims that claim for damages.[615] At the same time, the Danish Government finds that such initiatives should be well-balanced to avoid creating new rules of procedure and compensation rules within the scope of competition law differing substantially from what applies to the general law of torts and law of procedure.[616]

The government of the United Kingdom notes that public enforcement is the primary means of enforcing competition law and holds that it is important not to compromise that, or divert resources from it.[617] According to the government of the United Kingdom, private actions are however also a very important complementary limb of an effective competition regime.[618] The government of the United Kingdom reminds that private actions allow those who have suffered loss to be compensated and, alongside other means, can in practice provide an important additional deterrent to those who may cause loss.[619]

The government of the United Kingdom concludes that the implementation of some of the options suggested by the European Commission would either affect the whole domestic civil law system or create special rules for competition issues only.[620] There would need to be a very clear justification for making domestic rules applicable to competition law distinct from other areas of law.[621] In order to safe-

610. German Federal Ministry of Economics and Technology and the Federal Cartel Office 2006.
611. Ibid.
612. Ibid.
613. Ibid.
614. Ibid.
615. Danish Ministry for Economic and Business Affairs 2006.
616. Ibid.
617. United Kingdom Government 2006.
618. Ibid.
619. Ibid.
620. Ibid.
621. Ibid.

guard consistency with national laws and national competition law generally, the government of the United Kingdom notes that there are strong arguments for action being taken at Member State level rather than at Union level, particularly where these arguments relate to areas of substantive law such as damages and liability or to procedural law dealing with disclosure, costs and access to evidence.[622] In each system, there are different sets of checks and balances in place, in order to retain a balance between claimants and defendants.[623]

Regarding finding the right balance between public and private enforcement, the United Kingdom government makes clear that leniency is an essential tool in the investigation of cartels.[624] The United Kingdom believes that in making it easier to bring private actions, undertakings must not be discouraged from applying for leniency.[625] The United Kingdom believes that material created to support an undertaking's leniency application should be protected from disclosure.[626] In the United Kingdom such material could include transcripts of interviews and witness statements.[627] An exclusion of this type would ensure that leniency applicants do not place themselves in a position worse than that of the other members of the cartel.[628] As it comes to limiting the liability for the leniency applicant, the government of the United Kingdom states that this should not be at the expense of claimants.[629]

The Finnish government concludes that the implementation of nearly all of the options proposed by the European Commission would require changes in the substance of the Finnish Act on Competition Restrictions, Damage Compensation Act, Act on the Openness of Government Activities, and the Code of Procedure.[630]

The Finnish government reminds that the CJEU has ruled that, in the absence of Union rules on the issue, it is for the legal systems of Member States to provide detailed rules for bringing damages actions.[631] Proceedings in damages claims thus fall under the jurisdiction of national courts of law.[632]

The Finish government observes that the European Commission holds that Union law demands an efficient system for damages claims for the infringement of antirust rules and that this legislation in the Member States is underdeveloped.[633] According to the Finnish government it is not clarified, at least not sufficiently, by what, according to the European Commission, would constitute the legal basis or other

622. United Kingdom Government 2006.
623. Ibid.
624. Ibid.
625. Ibid.
626. Ibid.
627. Ibid.
628. Ibid.
629. Ibid.
630. Finland Ministry of Trade and Industry 2006.
631. Ibid.
632. Ibid.
633. Ibid.

means by which the European Commission could take further measures on Union level.[634]

Regarding the leniency policy, the Finnish government concludes that providing benefits to the immunity recipient by reducing the liability of the immunity recipient may prove problematic since it increases the liability of the other cartel members.[635] The suggested option that the leniency applicant will be exempted from the joint and several liability relating to the injury, and that liability be delimited to the portion of the damages corresponding to the applicant's share of the cartel's operational market could be taken into consideration, according to the Finnish government.[636]

The Irish competition authority notes that given the importance of EU and national competition laws, it supports action by the European Commission to ensure that the right to bring a damages action for breach of EU competition laws (and national competition laws) is a reality in all Member States.[637] Since there are great differences in national legal and court systems, the competition authority is concerned to ensure that any specific rules concerning antitrust damages action will not have unintended and potentially harmful effects on the conduct of other damages actions in Member States.[638] For this reason, the competition authority asked the European Commission to adopt a minimalist approach, namely, to adopt only those rules deemed necessary to ensure that the right of damages action for EU competition laws (and national competition laws) is viable in all Member States.[639]

With respect to protecting the leniency policy and providing additional benefits to the immunity recipient, the Irish competition authority appears to have a disapproving attitude. The competition authority believes that, weighing up the pros and cons of applying for leniency, it will always be to an undertaking's, or individual's advantage to come forward for leniency.[640] If it does, and leniency is granted, then, although it may subsequently be exposed to damages, its risk will be less than if it did not apply for leniency, in which case it would risk both substantial penalties and damages.[641] Also, the competition authority does not believe that a leniency applicant should be "rewarded" for coming forward by having his exposure to damages limited or excluded.[642] He is already benefiting from either immunity from prosecution or some other form of leniency.[643] Moreover, it is very difficult to see in an Irish context how it would be possible to exclude the discoverability of the immunity applicant's information (application).[644]

634. Finland Ministry of Trade and Industry 2006.
635. Ibid.
636. Ibid.
637. Irish Competition Authority 2006.
638. Ibid.
639. Ibid.
640. Ibid, para 8.3.
641. Ibid.
642. Ibid, para 8.4.
643. Ibid.
644. Ibid.

The Netherlands has commented that it deplores the fragmented approach of the European Commission.[645] The European Commission interferes in several fields of law, like competition law, contract law, intellectual property and consumer law and provides specific measures that affect the national civil legal framework. It is important to recognize that civil procedural law in each Member State is an internally consistent system. If the EU adds measures and remedies or changes existing measures, it will probably mean that the national system becomes unbalanced.[646]

At the same time, the Netherlands notes that a European approach to civil enforcement is important to ensure a level playing field.[647] Differences in legal possibilities for damages claims could lead to forum shopping or adverse effects on the business climate in the Member States.[648] Therefore, a European approach to this issue is desirable to avoid excessive differences arising between the various Member States. However, as said, the Netherlands is of the opinion that this issue must be addressed in a broader context than just competition law.[649] Regarding the leniency policy, the Dutch comments are in line with the comments from Finland.

From the above, the following can be concluded. The responses show that many Member States are anxious about harmonizing civil law. Primarily, many Member States consider civil law legislation as a national matter where the EU does not necessarily have to interfere. It is questioned by several Member States whether the interference is not in conflict with the principle of subsidiarity.

Remarkably, with regard to the relation between public enforcement and private enforcement, many Member States considering protecting the leniency programme of the utmost importance. Public enforcement is the “sacred cow” where a punitive character and deterrence comes from. Private enforcement, aiming at compensation for victims clearly plays second fiddle only.

Most Member States believe that the effectiveness of the leniency policy is best protected if the information of the applicant's request is protected from disclosure.

At the same time, none of the Member States advocate an additional discount for the leniency applicant regarding the damage to compensate. For some Member States, excluding the leniency applicant from joint liability is worth discussing. Other Member States argue that public enforcement, including the leniency programme, should be considered completely separate from the civil law system. A leniency application should not affect the claims of victims against the cartel offenders in one way or the other. Moreover, a limitation of liability for a leniency applicant is undesirable as it could be seen as an undesirable bonus for a cartel offender.

645. Netherlands Ministry of Economic Affairs 2006.
646. Ibid.
647. Ibid.
648. Ibid.
649. Ibid.

3.2.10 White Paper, Commission Staff Working Paper and Assessment Report

3.2.10.1 *Introduction*

The European Parliament concurred with the findings of the Green Paper, as did other stakeholders, and called on the European Commission to prepare a White Paper with detailed proposals to address the obstacles to effective antitrust damages actions.[650]

The White Paper is to be read in connection with two Commission staff working documents: (a) the Commission staff working paper on EU antitrust damages actions, which explains in greater detail the considerations underlying the White Paper and also provides an overview of the already existing EU law; and (b) an Impact Assessment Report which analyses the potential benefits and costs of various policy options and gives an executive summary of the report.[651]

3.2.10.2 *Objectives of the White Paper*

The White Paper considers and puts forward proposals for policy choices and specific measures that would ensure that all victims of infringements of European competition law have access to effective redress mechanisms so that they can be fully compensated for the harm suffered.[652]

The primary objective of the White Paper is to improve legal conditions for victims to exercise their Treaty rights to reparation for all damage suffered as a result of a breach of the European competition rules.[653]

It is interesting to note that despite the criticism of the Member States, the European Commission continued to draw up proposals for the adaptation of civil law legislation in the Member States.

According to the European Commission, effective remedies for private parties also increase the likelihood of a greater number of illegal restrictions on competition being detected and of the infringers being held liable.[654] Inherently, improving compensatory justice also produces beneficial effects in terms of deterrence, i.e. reducing future infringements and increasing compliance with EU competition rules.

The European Commission makes clear that part of its policy is to preserve strong public enforcement of Article 101 and Article 102 of the TFEU by the European Commission itself and by the competition authorities of the Member States. The European Commission states that the measures put forward in the White Paper

650. European Commission 2008 (White Paper on Damages Actions), p. 2.
651. Ibid, p. 3.
652. Ibid, pp. 2-3.
653. Ibid, p. 3.
654. Ibid.

are designed to create an effective private enforcement system that complements, but does not replace or jeopardize, public enforcement.

In the Green Paper, the European Commission provided several options for addressing the various difficulties with private enforcement in the EU. In the White Paper, the European Commission proposes policy choices in relation to most of these issues.

3.2.10.3 *Interaction Between Public and Private Enforcement*

Regarding the interaction between public and private enforcement, the European Commission notes in its Commission Staff Working Paper that given the inevitable interaction between an increased level of damages claims and the operation of an efficient leniency programme, the attractiveness of leniency programmes in Europe should be maintained, on the one hand, by ensuring an adequate level of protection for leniency applications in later litigation and, on the other hand, by trying to further incentivize potential immunity applicants to apply for leniency.[655]

The European Commission emphasizes that adequately protecting corporate statements submitted by a leniency applicant from disclosure in private actions must be ensured in order to avoid placing the applicant in a less favorable situation than the co-infringers.[656] Otherwise, according to the European Commission, the threat of disclosure of the confession submitted by a leniency applicant can have a negative influence on the quality of its submissions, or even dissuade an infringer from applying for leniency altogether.[657] Therefore, the European Commission suggests that protection should apply as follows:

i. whenever disclosure is ordered by a court, be it before or after adoption of a decision by the competition authority;
ii. to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 101 of the TFEU (and also where national law is applied in parallel); and
iii. regardless of whether the application for leniency is accepted or rejected, and even if it does not lead to any decision by the competition authority.[658]

Furthermore, the European Commission proposes limiting the civil liability of the immunity recipient to claims by its direct and indirect contractual partners.[659] This mechanism suggests that the immunity recipient only maintains civil liability towards its direct and indirect contractual partners.[660] As a result, the only persons entitled to compensation from the immunity recipient would be the victims who directly purchased or sold the cartelized products or services from the immunity recipient (i.e. direct contractual partners) or those further down the supply chain

655. European Commission 2008 (Working Paper Accompanying White Paper on Damages Actions), p. 84.
656. European Commission 2008 (White Paper on Damages Actions), p. 10.
657. Ibid.
658. Ibid.
659. Ibid.
660. European Commission 2008 (Working Paper Accompanying White Paper on Damages Actions), p. 88.

who purchased or sold these products or services (directly or through intermediaries) from the direct contractual partners.[661] According to the European Commission, this would help to make the scope of damages paid by immunity recipients more predictable and more limited without unduly sheltering them from civil liability for their participation in an infringement.[662] The immunity recipient would have to bear the burden of proving the extent to which its liability would be limited.[663]

In response to the European Commission's invitation, more than a hundred parties commented on the White Paper. In its comments, German ministries and the BKartA allege that leniency programmes are of paramount importance for the entire system of antitrust enforcement. For this reason, care should be taken that the design of private antitrust enforcement affects the effectiveness of the leniency programmes of the Member States as little as possible. Accordingly, the protection of confidential data of principle witnesses must be guaranteed.[664] The government of the Netherlands states that it supports the proposal to protect all corporate statements made by leniency applicants. The Netherlands firmly believes that strong public enforcement of antitrust rules must be preserved. To this end, it considers it essential that the leniency programmes are and remain attractive.[665]

Concerning the interaction between litigation and leniency programmes, several parties agree with the European Commission's suggestions and are of the opinion that the proposals would secure the functioning of the leniency policy.[666] Some parties believe that the leniency applicants should also assist the private plaintiffs in the civil proceedings by providing the claimants with information.[667] Others are of the opinion that taking away joint and several liability from the applicant with immunity is difficult to apply under domestic law[668] and overly mild and blurs the line between private enforcement and public enforcement.[669] Moreover, many commentators allege that the limitation of liability of immunity recipients should not have adverse consequences for victims seeking compensation for damages.[670]

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661. European Commission 2008 (Working Paper Accompanying White Paper on Damages Actions), p. 88.
662. European Commission 2008 (White Paper on Damages Actions), p. 10.
663. Ibid.
664. German Federal Ministry of Economics and Technology, Federal Ministry of Food, Agriculture and Consumer Protection and the Federal Cartel Office 2008. *Cf.* Austrian Federal Ministry of Justice and Federal Ministry of Economics and Labour, and Ministry of Social Affairs and Consumer Protection 2008, under K; Danish Ministry for Economic and Business Affairs 2008, para 9; Irish Department of Enterprise, Trade and Employment 2008, p. 30.
665. Netherlands 2008, p. 16.
666. Allen & Overy 2008, paras 41-45.
667. Howrey 2008, para 9.
668. E.g. Austrian Federal Ministry of Justice and Federal Ministry of Economics and Labour, and Ministry of Social Affairs and Consumer Protection 2008; Danish Ministry for Economic and Business Affairs 2008, para 9.
669. Max Planck Institute 2008, para 2.9. See also Linklaters 2008, para 10.
670. See *inter alia* Netherlands 2008, p. 16; Irish Department of Enterprise, Trade and Employment 2008, p. 30; Austrian Federal Ministry of Justice and Federal Ministry of Economics and Labour, and Ministry of Social Affairs and Consumer Protection 2008, p. 10.

Almost all parties agree that private enforcement could negatively influence the leniency programme, a programme that most parties considered highly effective and worthy of protection.

3.3 Towards European Antitrust Damages Legislation

3.3.1 Introduction

After receiving the comments on the White paper, the European Commission started drafting a directive. By the end of 2009, the European Commission had drafted a directive to give effect to Article 101 and Article 102 of the TFEU by strengthening the compensation rights of victims of competition law infringements.

Through the introduction of a set of rules designed to address the most important obstacles for effective compensation the proposed directive aimed to ensure that all victims are in a position to obtain full compensation for the harm caused by an infringement of the European competition rules. Furthermore, the proposed directive introduced additional safeguards concerning representative actions and access to evidence, as suggested by stakeholders in the course of the public consultation process.

The proposed directive would have obliged Member States to amend, if necessary, their laws so that they were in accordance with directive provisions, including on proposals for representative actions.[671] In the proposed directive, non-profit organizations would be able to bring claims on behalf of groups of consumers who do not need to be individually identified.[672] This provision generated fears of opt-out class actions and claims being brought on behalf of consumers at large.[673] Aside from this specific concern, the very idea of the European Commission interfering with Member States' internal legal systems was itself controversial and many questioned whether the European Commission was entitled to do so.[674] In March 2009 the European Parliament adopted a resolution in which it insisted on being involved in "the co-decision procedure" in any legislative initiative in the area of collective redress.[675] The European Commission chose to ignore the Parliament's wishes and struck out alone.[676] The Parliament's reaction, coupled with the criticism from legal practitioners and business commentators across the EU, assisted in building the pressure which led to the rumored personal intervention of former President Barroso and the ultimate withdrawal of the proposed directive.[677]

671. Boylan 2009.
672. Ibid.
673. Ibid.
674. Ibid.
675. Ibid.
676. Ibid.
677. Ibid. *Cf.* Ashton & Henry 2013, para 0.09. See also Bucan Gutta 2013, para 4.4; Pohlmann 2011, p. 162 et seq.

3.3.2 The Antitrust Damages Directive

3.3.2.1 *Introduction*

In 2013, former Commissioner Almunia presented an amended version of the proposed directive. The most important differences from the earlier draft directive are that a co-decision procedure has been used by the European Commission and that provisions for collective redress are no longer included. In 2014, the Antitrust Damages Directive was accepted.[678]

3.3.2.2 *The Antitrust Damages Directive*

The name of the Antitrust Damages Directive is somewhat confusing because the name does not make clear that the Antitrust Damages Directive is actually meant to deal with two main issues. As the name indicates, the first issue dealt with by the Antitrust Damages Directive relates to damages actions as such. But the second issue, not described in the name, relates to the protection of the leniency policy.[679] Lawmakers have tried to protect the competition authority (as a public law enforcer) by attempting to ensure that the leniency policy is not jeopardized by an increase in private enforcement.[680]

According to the European Commission, the objectives could be best pursued through a directive. This was believed to be the most appropriate legal instrument to make the measures effective and to ensure smooth adoption into the legal systems of the Member States.[681]

The reason is that a directive requires Member States to achieve objectives and implement the measures into their national substantive and procedural legal systems.[682] This approach gives Member States more freedom to implement a measure than a regulation would. The choice of the most appropriate tools to implement measures in the directive is left up to the Member States.[683] This allows Member States to ensure consistency of these rules with their national substantive and procedural laws. Furthermore, according to the European Commission, a directive is a flexible tool for the introduction of common rules in areas of national law that are crucial for the functioning of damages actions. It ensures adequate guarantees across the European Union, while leaving room to the individual Member States for additional measures if they choose to adopt them.[684] Moreover, the European Commission has made clear that a directive avoids intervention in any situation

678. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.
679. See also Antitrust Damages Directive, Article 1 (2). See also Rusu 2017, p. 805; Wilman 2016, pp. 906 and 930-931 (footnote 242); Glazener 2013, p. 117.
680. See e.g. Rusu 2017, p. 805; Tzankova, Plomp & Raats 2013, p. 186.
681. European Commission 2013 (Proposal Directive on Damages Actions), para 3.
682. Ibid, para 3.4.
683. Ibid, para 3.
684. Ibid.

where the domestic legal provisions of a Member State are already in line with the proposed measures.[685]

As the European Commission notes correctly, a directive at the EU level is only possible as long as it is in accordance with the basic principles of the European Union, specifically the subsidiarity and proportionality principles.[686]

With their comments on the Green Paper and White Paper, the Member States have tried to reduce to impact of the European Commission's idea to provide a specific pan-European private enforcement system for competition law infringements.[687] That was only successful to a limited extent. With the Antitrust Damages Directive, a pan-European private enforcement system has been introduced.

The question whether the regulation could not be regulated nationally, is answered in the negative. The EU legislator holds that it has competence regarding the subject matter. It concludes that the principle of subsidiarity is ensured.

In the proposed directive of 11 June 2013, the European Commission states that the suggested legislation is fully in line with the subsidiarity principle since its objectives cannot be sufficiently achieved by the Member States, and there is a clear need for, and value in, EU action.[688] A legally binding act at EU level will ensure more easily that full effect is given to Articles 101 and 102 TFEU through common standards allowing for effective damages actions across the EU, and that a more level playing field is established in the internal market.[689]

More specifically, the proposed directive is deemed to comply with the principle of subsidiarity for several reasons, according to the European Commission. First of all, there is a significant risk that effective public enforcement by the European Commission and national competition authorities would be jeopardized in the absence of EU-wide regulation of the interaction between public and private enforcement, and in particular of a common European rule on information from the file of a competition authority being available for the purposes of a damages action. Moreover, the European Commission notes that experience shows that, in the absence of EU legislation, most Member States do not provide, on their own initiative for an effective framework for compensation for victims of infringements of Articles 101 and 102 TFEU, as repeatedly required by the CJEU. In addition, the European Commission concludes that there is currently a marked inequality between Member States in the level of judicial protection of individual rights guaranteed by the Treaty; this may cause distortions of competition and impede the proper functioning of the internal market.[690] The result is an evident disparity in even the content of the entitlement to damages guaranteed by EU law.

685. European Commission 2013 (Proposal Directive on Damages Actions), para 3.
686. Ibid.
687. See *inter alia* German Federal Ministry of Economics and Technology, Federal Ministry of Food, Agriculture and Consumer Protection and the Federal Cartel Office 2008.
688. European Commission 2013 (Proposal Directive on Damages Actions), para. 3.2.
689. Ibid.
690. See also Rusu 2017, pp. 802-803.

The Antitrust Damages Directive is based on Articles 103 and 114 of the TFEU. The Directive's provisions should be incorporated into the Member States' national legislation completely. Only if it can be inferred from the wording of a directive may a Member State implement rules stricter than the provisions set out in the directive.[691] This means that the provisions of the Antitrust Damages Directive should be implemented in national jurisdictions completely and countries are not allowed to have other rules unless explicitly stated in the specific provision of the Antitrust Damages Directive. For example, regarding the disclosure provisions, Article 5 of the Directive allows Member States to have rules leading to wider disclosure of evidence than that provided in the Directive.[692]

The Antitrust Damages Directive is divided into seven chapters. The first chapter (Articles 1—4) pertains to the subject matter, the scope and the definitions used in the Antitrust Damages Directive. Chapter Two (Articles 4—8) refers to disclosure of evidence. Chapter Three relates to decisions of competition authorities, limitation periods and joint and several liability (Articles 9—11). Chapter Four (Articles 12—15) deals with the passing-on of overcharges. Chapter Five (Articles 16—17) contains some provisions on estimating the damages and Chapter Six (Articles 18—19) provides a few special rules on alternative dispute resolution in relation to antitrust damages. Chapter Seven (Articles 20—23) provides a few final provisions. Article 21(1) of the Antitrust Damages Directive provides that Member States must implement the Antitrust Damages Directive into their legal systems by 27 December 2016. Practice showed however, that — at least in the Netherlands — even prior to implementation, national courts were treating the Antitrust Damages Directive as rules of law and referred to it in their decisions.[693]

As already discussed, the European Commission believes that an upcoming private enforcement could jeopardize the leniency programme. Therefore, it provided legal instruments to protect the leniency programme in its Green Paper, White Paper, the Draft Antitrust Damages Directive and in the Antitrust Damages Directive. Although it is not written down by the European Commission, it appears that the *Pfleiderer* case[694] — which made clear that information, also related to leniency, could be open for disclosure, and potentially brings a risk for leniency applicants — accelerated the Antitrust Damages Directive legislation process, in order to protect the leniency programme.[695]

The fear of competition authorities — not least the European Commission — that the effectiveness of the leniency may be jeopardized by an upcoming private enforcement appears well founded. From research and models of several economists

691. *Cf.* Lenaerts & Van Nuffel 2011, p. 296.
692. Antitrust Damages Directive, Article 5 (8).
693. See e.g. Hoge Raad 8 July 2016 (*TenneT v ABB*), point 4.3.4; Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.27; Rechtbank Gelderland 10 June 2015 (*TenneT v Alstom*); Rechtbank Gelderland 24 September 2014 (*TenneT v Alstom*), point 4.10. See also Kuijper & Leeflang 2015, p. 31.
694. CJEU 14 June 2011 (*Pfleiderer AG v BkartA*).
695. *Cf.* Oude Elferink & Braat 2014, p. 218.

it is clear that the upcoming increase in private enforcement, resulting in claims for the immunity recipient, will jeopardize the effectiveness of the leniency programme indeed as long as no additional measurements are taken to prevent that.[696]

Also, the CJEU and several (legal) practitioners and scholars already mentioned that an upcoming private enforcement (including the disclosure of leniency information) could jeopardize the effectiveness of leniency.[697] For example, Rusu notes that due to the enormous potential group of victims that can claim for damages, the incentives of cartel infringers to apply for leniency alter, since doing so renders them 'sitting ducks' for private damages suits initiated by the cartelists' and non-cartelists' customers and consumers alike.[698]

The Hungarian legislator was also of the opinion that supporting private damages claims could affect the effectiveness of the leniency programme. The Hungarian legislator already took legal measurements prior to the creation and implementation of the Antitrust Damages Directive. The Hungarian system provided several instruments to protect the effectiveness of the leniency policy. The (old) system in Hungary will be discussed briefly in Chapter 4. In Chapter 5, the relation between public and private enforcement in the United States is analyzed. From the comparison with the US system it becomes clear that the American legislator is also of the opinion that the leniency programme could be jeopardized by private enforcement claims.

It should be noted that if the fine of the competition authority is extremely high — as is common practice in Europe — it appears logical that private enforcement has only limited meaning in determining whether or not to apply for leniency, as long as the exposure of damages claims is relatively little, not to say tiny. The risk that another infringer takes the enormous benefits of the "leniency carrot", by submitting a leniency application, will often be too big, especially if there is ongoing cartel activity and it is uncertain what competitors will do. In such a situation, the management will still often decide to apply for leniency. That analysis could very well change if everyone who suffered damages would be fully compensated for the competition law infringement, as set forth by the CJEU and stipulated in the Antitrust Damages Directive.

The starting point for the fine is a percentage of the company's annual sales of the product concerned by the infringement.[699] Empirical studies of past cartels show that overcharges of 20% or more during the cartel are common.[700] It is likely that even without any other loss (besides the overcharge) for the victims of the cartel infringement, even without interest to be compensated and even without the risk

696. Buccirossi, Marvão & Spagnolo 2015, p. 2; Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, *inter alia* p. 387; Silbye 2011, p. 692; Harrington 2008, p. 237; Renda *et al.* 2007, Chapter 6.
697. CJEU 14 June 2011 (*Pfleiderer AG v BkartA*), points 25-27; Emmerich 2014, point 3; Kersting 2014; Ortega Gonzáles 2014; Braat 2013, p. 325. *Cf.* also OECD 2015, p. 37.
698. Rusu 2017, p. 802.
699. European Commission 2011 (Factsheet).
700. Oxera *et al.* 2009, p. 91.

that other infringers are unable to pay (and the infringer has to pay a part of that damages as well), a well-functioning private enforcement system could collect a total damages sum in compensation that exceeds that which competition authorities collect through infringement fines.[701] Based on the doctrine of the cost-benefit analysis, this expanding exposure will become an (even more) relevant factor in deciding whether or not to apply for leniency.

In the following sections the Antitrust Damages Directive will be discussed in more detail. Not all aspects will be discussed as they are not all directly relevant for answering the question whether the effectiveness of the leniency policy may be jeopardized by an upcoming private enforcement and how this could be prevented.

With regard to the relation between private enforcement and leniency, the following elements of private enforcement are identified as most relevant by the author. In fact, they all relate to the cost-benefit analysis, as described in Section 2.2.4.

- Whether infringers are liable for harm caused. If they are not liable, the risk of civil liability is non-existent and negative effects in civil procedures can be ruled out (See Section 3.3.2.3).
- Whether leniency from the public authorities also protect infringers from civil liability (See Section 3.3.2.7);
- What the (potential) damages the infringer has to compensate are. Only loss? Also lost profit and interest? And is the infringer jointly and severally liable? (See Sections 3.3.2.3 and 3.3.2.7);
- Whether infringers are jointly and severally liable for the damages. If so, it significantly increases the potential liability of individual infringers (See 3.3.2.7). It also implies that claimants could choose their favorite infringer(s) to claim the damages from, as all infringers are liable for the complete damage;
- How damages have to be proven and whether damages may be estimated. If it is difficult to prove damage, and estimations are not accepted by the courts, it is likely that it is rather difficult, not to say impossible, to successfully claim for damages, which could be considered advantageous for the infringers (See Section 3.3.2.3).
- What the group of potential claimants is. If the group of potential claimers is limited, for example, to claimants with a direct connection to the infringer, or difficult because it is practically impossible to claim damages for claimants with little loss, this might have consequences for the total exposure. The impact of a leniency application in the private enforcement atmosphere could be more limited (See Section 3.3.2.3).
- Whether and which information from the public enforcement case will become available for potential claimants (See 3.3.2.4)
- Whether public enforcement decisions can be, and are, used in private enforcement procedures and whether they are of assistance for claimants in private enforcement procedures (See 3.3.2.5);

701. E.g. according to the European Commission the estimated loss of hardcore cartels is EUR 25 and 69 billion per year (See Section 3.2.9.1). That is far more than the accumulated fines per year of the European competition authorities combined.

- Whether there are limitation periods that claimants have to take into account (See 3.3.2.6). If there would be no limitation period, or an extremely long period, it implies that claimants have a lot of time to claim for damages. It brings uncertainty for infringers for a long time about which claims may be expected.
- Whether the limitation period depends on the (final) public enforcement decisions (See 3.3.2.6). If so, a final decision for one does not have to be final towards the other. It could be interesting to claim damages from the infringers to whom the decision is already final.

3.3.2.3 *Damages and Estimating the Damages*

The Antitrust Damages Directive sets out rules necessary for *all* victims of competition law infringements to recover full compensation for the damage suffered. Furthermore, the Antitrust Damages Directive sets out rules concerning the coordination of public enforcement by competition authorities and private enforcement by national courts.[702] The premise of the Antitrust Damages Directive is that full compensation of damages is available to anyone who has suffered damage as a result of the competition law infringement. The explanation of "damage" is in line with CJEU case law.[703] Damage consists of the loss suffered, lost profits and interest.

The Antitrust Damages Directive relates to cartel infringements as well as abuse of a dominant position based on Articles 101 and 102 of the TFEU and similar national provisions in the Member States if applied in parallel.[704] By extending the scope of the Antitrust Damages Directive to national provisions used in parallel, the Antitrust Damages Directive aims to prevent the application of different private enforcement rules to one and the same cartel infringement, which could hinder the proper functioning of the internal market.[705] Eliminating this problem should help prevent legal uncertainty.

The Antitrust Damages Directive does not have consequences for competition law infringements that do not affect trade between EU Member States, as intended in Articles 101 and 102 of the TFEU.[706] The compensation to be paid may not lead to overcompensation.[707] This is to prevent "American-style situations".[708] Article 17(2) of the Antitrust Damages Directive makes clear that there is a presumption that a cartel infringement causes damage. It is for the cartel infringer to rebut this presumption, which eases the burden of proof on claimants. Article 17(1) of the Antitrust Damages Directive provides that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. The Antitrust Damages Directive states that Member States must ensure that the national courts are empowered, in

702. Antitrust Damages Directive, Article 1.
703. Oude Elferink & Braat 2014, p. 222.
704. Antitrust Damages Directive, Article 2 (1).
705. Ibid.
706. Ibid, Preamble under 10.
707. Ibid, Article 3 (3) and Preamble under 13.
708. Oude Elferink & Braat 2014, p. 223.

accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available. On its website, the European Commission provides several documents, including a Communication and a Practical Guide, to assist both national courts and the parties involved in litigation in quantifying the damages resulting from antitrust infringements.[709]

Chapter IV of the Antitrust Damages Directive contains special provisions relating to passing-on the overcharge. Article 12 of the Antitrust Damages Directive was implemented after the European Parliament suggested it. It contains an umbrella clause. It should be possible to be compensated for all damage, and overcompensation should be prevented.[710] Pursuant to Article 13 of the Antitrust Damages Directive, infringers must be able to invoke the passing-on defense.[711] It implies that competition law infringers could allege that the claimants have passed-on the higher price completely, or partly, which potentially results in no damage or lower damage for the (direct) claimants.[712] The burden of proving that the overcharge was passed-on rests with the defendant. The defendant may reasonably require disclosure from the claimant, or from third parties, in order to receive evidence that the overcharge was passed-on.[713] Article 14 of the Antitrust Damages Directive contains a special provision for indirect purchasers. Indirect purchasers have the onus of proving that the loss or damage was passed-on and should be able to request evidence from the defendant and third parties. Unless the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser, the indirect purchaser proves that the higher price was passed on if it shows the following: (i) the defendant committed an infringement of competition law; (ii) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and (iii) the indirect purchaser purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from them or containing them.[714]

Pursuant to Article 15 of the Antitrust Damages Directive, it must be avoided that litigation brought from different levels in the supply chain produces multiple liability or the absence of liability on the part of the infringer. A court should be able to take into account damages claims originating from other levels in the supply chain, other judgments that are issued in that respect, and relevant information in the public domain resulting from the public enforcement of competition law.[715] As the calculation of the overcharge is complex, under Article 16 of the Antitrust Damages Directive, the European Commission has the obligation to issue guidelines

709. http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html.
710. Oude Elferink & Braat 2014, p. 228.
711. Ibid.
712. Ibid.
713. Antitrust Damages Directive, Article 13.
714. Ibid, Article 14 (2).
715. Oude Elferink & Braat 2014, p. 228.

for national courts on how to estimate the share of the overcharge passed-on to the indirect purchaser.[716]

3.3.2.4 *Collection of Information*

The mitigation of evidence asymmetry is the basis of Chapter II of the Antitrust Damages Directive.

Article 5 of the Antitrust Damages Directive states the standard rule concerning access to evidence. A court must be able to order defendants and third parties to provide relevant evidence if a claimant makes a reasoned request containing the available facts and relevant evidence, which should be sufficient to make it plausible that the party has a claim.[717] The access to the evidence must be limited to what is proportionate.[718] In doing so, the court should take into account the legitimate interests of the parties involved, as well as the interests of third parties.[719] In particular, the court should consider the following: (i) whether the request for information is justified based on the facts and the evidence provided; (ii) whether the information request is justified based on the scope of the information request and the costs of the publication of the information; and (iii) whether the information requested contains confidential information, including from third parties.[720] Article 5 makes clear that the risk of becoming involved in litigation is not a legitimate reason for not providing information.[721]

According to Article 5(4) of the Antitrust Damages Directive, the national courts should have the power to order the disclosure of evidence containing confidential information where it is relevant to the action for damages. When a court orders the disclosure of such information, it should have at its disposal effective measures to protect the confidential part of the information.[722] Applicable legal professional privileges under EU or national law should be respected when ordering the disclosure of evidence.[723] The party from which information is sought should have an opportunity to be heard before a national court orders disclosure under Article 5 of the Antitrust Damages Directive.

Pursuant to Article 5(8) of the Antitrust Damages Directive, the Member States are allowed to enforce and introduce rules concerning the disclosure of evidence leading to a broader disclosure of evidence. Article 6 contains an additional provision regarding information in the possession of the competition authority. National courts could request a competition authority to divulge evidence included in its file only where no party or third party is reasonably able to provide that evidence.[724] Member States must ensure that evidence obtained by a natural or legal person

716. Antitrust Damages Directive, Article 16.
717. Ibid, Article 5 (1).
718. Ibid, Article 5 (3).
719. Ibid.
720. Ibid.
721. Ibid, Article 5 (5).
722. Ibid, Preamble under 18.
723. Ibid, Article 5 (6).
724. Ibid, Article 6 (10). See also Preamble point 29.

solely through access to the file of a competition authority can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.[725] The national court must decide whether it is proportionate to order a competition authority to provide information. The court should consider whether: (i) it concerns a specific request for specific information (to prevent fishing expeditions); (ii) the request for information relates to a legal private enforcement action; and (iii) there is a need to safeguard the effectiveness of the public enforcement of competition law.[726]

Courts cannot order a party or a third party to disclose the leniency statement and a settlement submission.[727] This is called Chapter II's "black list".[728] There is also a "grey list", which includes documents that may only be disclosed after the competition authority by adopting a decision or otherwise, has closed its proceedings.[729] This relates to documents: (i) prepared by a natural or legal person specifically for the proceedings of a competition authority; (ii) information drawn and sent by the competition authority to parties in the course of its proceedings; and (iii) settlement submissions that have been withdrawn.[730] Information not mentioned on the black list or the grey list may be ordered in actions for damages at any time, without prejudice to Article 6 of the Antitrust Damages Directive.[731]

To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.[732]

Article 7 of the Antitrust Damages Directive contains obligations to ensure the confidentiality of documents as stated on the black and the grey lists. If this information is obtained by a natural or legal person solely through access to the file of a competition authority, despite the fact that Articles 6(5) and 6(6) of the Antitrust Damages Directive prevent that, the information is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules. This is to ensure the full effect of the limits on the disclosure of evidence set out in Article 6 of the Antitrust Damages Directive. Pursuant to Article 8 of the Antitrust Damages Directive, national courts should be able to effectively impose sanctions on parties, third parties and their legal representatives if: (i) they acted contrary to a court order to provide information; (ii) they destroyed evidence; (iii) they ignored a court order to protect confidential information; or (iv) they ignored the limits on the use of evidence provided for in the Antitrust Damages Directive.[733] The sanctions must be effective, proportionate and dissuasive.[734] According to the

725. Antitrust Damages Directive, Article 7 (3).
726. Ibid, Article 6 (4).
727. Ibid, Article 6 (6).
728. Oude Elferink & Braat 2014, p. 224.
729. Antitrust Damages Directive, Article 6 (5); Oude Elferink & Braat 2014, p. 224.
730. Antitrust Damages Directive, Article 6 (5).
731. Ibid, Article 6 (9).
732. Ibid, Article 6 (11).
733. Oude Elferink & Braat 2014, p. 224.
734. Antitrust Damages Directive, Article 8 (2).

Antitrust Damages Directive, the sanctions which the national courts can invoke include, with regard to the behavior of a party to proceedings for an action for damages, the possibility of drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility of ordering the payment of costs.[735]

3.3.2.5 *Decisions of Competition Authorities*

When national courts rule on agreements, decisions or practices under Article 101 or 102 of the TFEU that are already the subject of a European Commission decision, Article 16 of Regulation 1/2003 makes clear that they cannot take decisions running counter to the decision adopted by the European Commission. They must also avoid giving decisions that would conflict with a decision contemplated by the European Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings.

Article 9 of the Antitrust Damages Directive has similarities to Article 16 of Regulation 1/2003. It makes clear that the infringement of competition law as determined in a final decision of a national competition authority, or by a review court, is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or 102 of the TFEU, or under national competition law.

This article is included to enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 of the TFEU, to increase the effectiveness and procedural efficiency of actions for damages, and to foster the functioning of the internal market for undertakings and consumers. The idea is that the findings of infringement of Article 101 or 102 of the TFEU in a final decision by a national competition authority, or a review court, should not be re-litigated in subsequent actions for damages.[736]

If the final decision is made in another Member State, that final decision may be presented before their national courts as at least *prima facie* evidence assessed along with any other evidence adduced by the parties.[737]

The effect of the national decisions by competition authorities is without prejudice to the rights and obligations of national courts under Article 267 of the TFEU. The national court may request the CJEU to give preliminary rulings concerning: (i) the interpretation of the Treaties; and (ii) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.[738]

735. Antitrust Damages Directive, Article 8 (2).
736. Ibid, Preamble point 34.
737. Ibid, Article 9 (2).
738. Ibid, Article 9 (3).

3.3.2.6 *Limitation Period*

Pursuant to Article 10, the limitation period is at least five years and does not begin to run before the competition law infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) of the behavior and the fact that it constitutes an infringement of competition law; (ii) of the fact that the infringement of competition law caused harm to it; and (iii) the identity of the infringer.[739]

The limitation period is suspended or, depending on national law, interrupted if a competition authority takes action for the purpose of the investigation or its proceedings with respect to an infringement of competition law to which the action for damages relates. The suspension ends, at the earliest, one year after the infringement decision has become final, or after the proceedings are otherwise terminated.

3.3.2.7 *Joint and Several Liability*

Undertakings infringing competition law collectively are jointly and severally liable for the harm caused by the collective infringement of competition law. Each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until it has been fully compensated.[740]

An infringer may recover a contribution from any other infringer, the amount of which is determined in light of their relative responsibility for the harm caused by the infringement of competition law.[741]

The Antitrust Damages Directive provides for two exceptions to the general rule of joint and several liability. There is an exception for a small-to-medium-sized enterprise ("SME") if the viability of the undertaking is at risk. This exception does not apply if: (i) the SME has led the infringement of competition law or has coerced other undertakings to participate in it; or (ii) the SME has previously been found to infringe competition law.[742]

In the Antitrust Damages Directive, the immunity recipient is jointly and severally liable towards its direct and indirect purchasers and providers. The immunity recipients are exempted from the general joint and several liability rule.[743] They are jointly and severally liable only to their direct and indirect purchasers or providers, unless full compensation cannot be obtained from the other infringers.[744] Moreover, for those other than (direct or indirect) purchasers and providers — for example victims of umbrella pricing as discussed in the *Kone* case[745] — the leniency applicant with immunity is only obliged to contribute to other infringers for its relative part

739. Antitrust Damages Directive, Article 10 (2)(3).
740. Ibid, Article 11 (1).
741. Ibid, Article 11 (5).
742. Ibid, Article 11 (2) and (3).
743. Ibid, Article 11 (4). See also Rusu 2017, p. 805.
744. Antitrust Damages Directive, Article 11 (4)(b). See also Rusu 2017, p. 805.
745. Ibid.

of the damages.[746] It means that in principle the immunity recipient is relieved from joint and several liability for the entire harm and any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers.[747] To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel.[748] The immunity recipient remains fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.[749]

3.4 Comparison and Analysis of the Directive and the Papers

3.4.1 Introduction

The development and adoption of the Antitrust Damages Directive was an interesting process. Although several Member States were critical about a specific pan-European private enforcement system, it was introduced and is part of European legislation. Claimants have several instruments to make it possible to claim for damages. With respect to the protection of the leniency policy, a completely new system has been introduced.

3.4.2 Instruments for Claimants

The Antitrust Damages Directive includes several provisions in order to make sure that claimants receive compensation. If civil law provisions in the Member States are not in line with these, they had to be adjusted accordingly.

The Antitrust Damages Directive provides that everyone who suffered harm as a result of a competition law infringement should be able to claim for damages. In line with European case law, the damage consists of loss suffered, lost profit and interest. The amount of harm may be estimated. The Antitrust Damages Directive also provides that infringers are jointly and severally liable, with some exceptions for small and medium enterprises and the immunity recipient. Parties are able to request the disclosure of specific information that could be helpful in the civil procedure. The Antitrust Damages Directive provides a system that helps indirect claimants to receive compensation and provides a limitation period that takes the outcome of a public enforcement procedure into account. Concerning the latter, the decision of the public enforcement procedure can be used as important evidence in the civil procedure.

The accepted instruments in the Antitrust Damages Directive ensure that claimants could successfully claim for damages. At the same time, the consequence of the provisions is that the damages claims for cartel infringers are still to be expected,

746. Antitrust Damages Directive, Article 11 (6).
747. Ibid, Preamble point 38.
748. Ibid.
749. Ibid.

including for leniency applicants. As addressed by several Member States, this can have a negative impact on the success of the leniency programme. If the potential damages to be compensated are so severe for the immunity recipient, the applicant could well be less interested in applying for leniency in the first place. Taking that into account, to protect the leniency policy and to coordinate public and private enforcement, the European legislator did introduce a special regime for leniency information and the potential liability of the immunity recipient. This will be discussed in Section 3.4.3.

It is interesting to note that the Antitrust Damages Directive does not include a provision concerning collective redress and representative actions.[750] In the draft 2009 directive, collective redress and representation actions were part of the proposal still. The European Commission considered the availability of collective damages actions particularly important for consumers harmed by antitrust violations.[751] There was clear critique from the Member States that the European Commission wanted to interfere. Several Member States considered this was a national affair. Moreover, Member States also argued that the topic should not be arranged only in relation to competition law but should be considered as a more general topic on the European agenda for consumers.[752]

In 2013, the European Commission published its initiative on Collective Redress.[753] This is not part of European legislation. It is an invitation for Member States to introduce a collective actions system, including actions for damages by July 2015. It is up to the Member States to make it easier for consumers to act as a group to receive compensation. The Member States can use the document of the European Commission in establishing a system. In January 2018, the European Commission published a report that shows that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU.[754] It appears that the European Commission will usurp the topic and provide more guidance or even legislation.[755]

3.4.3 Coordination of Public and Private Enforcement

In the various documents, attention was paid to the relationship between private enforcement and leniency. In the Green Paper and the accompanying Staff Working Paper, the European Commission signaled that an increase in private enforcement could have an impact on the effectiveness of leniency policy, at least to some extent. Already in its Green Paper, the European Commission provided some suggestions to prevent such negative consequences. It provided three options to ensure that leniency programmes and the rules on damages claims are coordinated so that the underlying aims would be optimally achieved: (i) exclusion of discoverability of

750. *Cf.* Rusu 2017, p. 808.
751. European Commission 2014 (Press Release).
752. Oude Elferink & Braat 2014, p. 218.
753. European Commission 2013 (Recommendation on collective redress mechanisms).
754. European Commission 2018.
755. Ibid.

information of the leniency applicant; (ii) rebate on damages claims; and (iii) removal of joint liability for the leniency applicant. [756]

The European Commission emphasized that it is important for a claimant to get access to evidence if it is to prove anti-competitive behavior. According to the European Commission, it must therefore be considered whether an obligation to hand over documents or otherwise provide access to evidence should be introduced.[757]

In its White Paper, the European Commission held that adequate protection against disclosure in private actions for damages should, in order to avoid placing the applicant in a less favorable situation than the co-infringers, be ensured for corporate statements submitted by a leniency applicant.[758] Otherwise, according to the European Commission, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of its submissions, or even completely dissuade the cartel infringer from applying for leniency.[759] Therefore, the European Commission suggested that protection should apply:[760] (i) to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 101 of the TFEU (even if national law is applied in parallel); and (ii) regardless of whether the application for leniency is accepted, rejected, or leads to no decision by the competition authority. The Antitrust Damages Directive provides such protection.

The European Commission also considered the possibility of limiting the joint and several civil liability of the immunity recipient to claims by the undertakings' direct and indirect contractual partners.[761] The mechanism implies that the immunity recipient retains civil liability for an infringement for which it received immunity, but only towards its direct and indirect contractual partners.[762] As a result, the only persons entitled to receive compensation from the immunity recipient would be the victims who directly bought the cartelized products or services from the immunity recipient (i.e. direct contractual partners), or those further down the supply chain that bought these products or services (directly or through intermediaries) from the direct contractual partners (i.e. indirect contractual partners).[763] The immunity recipient would then not be held liable for the damage suffered by a purchaser or provider that did not directly or indirectly purchase or provide cartelized products from/to it.[764] According to the European Commission, this would help to make the scope of damages paid by immunity recipients more predictable and

756. European Commission 2005 (Annex to the Green Paper on Damages Actions), pp. 65-66.
757. European Commission 2005 (Green Paper on Damages Actions), p. 5.
758. European Commission 2008 (White Paper on Damages Actions), p. 10.
759. Ibid.
760. Ibid.
761. Ibid.
762. European Commission 2008 (Working Paper Accompanying White Paper on Damages Actions), p. 88.
763. Ibid.
764. Ibid.

more limited, without unduly sheltering them from civil liability for their participation in an infringement.[765]

The Antitrust Damages Directive does provide an exception for an undertaking receiving immunity under the leniency programme. For such an undertaking, joint and several liability is limited to compensating its direct or indirect purchasers and providers and, is limited to compensating for its relative part, to third parties, to the extent that other damages can be recovered from other infringers.[766] In principle the immunity recipient is relieved from joint and several liability for the entire harm and any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. The immunity recipient remains fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers. The additional solution provided by the Green Paper, i.e. the leniency applicant would also receive a rebate on damages claim in the civil case, has not reached the final text of the Antitrust Damages Directive.

3.5 Conclusions

The two CJEU decisions of *Courage v Crehan* and *Manfredi* are the start and the heart of European private enforcement, together with Articles 101 and 102 of the TFEU. Everyone who has suffered damage (actual loss, lost profit and interest) from a competition law infringement should be able to receive compensation.

A problem arose because the rules were only explained to a limited extent by the CJEU. A possible consequence of the lack of clarity on private enforcement rules and regulations is that private enforcement potentially became an unpredictable enforcement tool from which it was not clear what cartel infringers and claimants should expect. Until recently, because of the lack of pan-European legislation, the further elaboration of private enforcement rules has had to come from the national courts and from national legislation. As long as there was no specific national legislation, the courts have had to define provisions in accordance with the case law of the CJEU.

Private enforcement has been in flux over the last decade. In addition to the various cases decided by the CJEU and national courts, the European Commission has been working on this topic extensively, with the result being the Antitrust Damages Directive, which had to be implemented by the Member States no later than 27 December 2016.

765. European Commission 2008 (White Paper on Damages Actions), p. 10.
766. Antitrust Damages Directive, Article 11 (4).

The Antitrust Damages Directive should ensure the possibility to claim for damages successfully. It provides several instruments that assist claimants in successfully claiming for damages. The Antitrust Damages Directive codifies much of the CJEU case law. Moreover, many of the solutions provided in the European Commission's Green Paper and White Paper are now, despite critique from Member States, EU law and part of national legislation.

New elements are integrated into national legislation and include the following: (i) the presumption that damages arise from cartel infringements; (ii) a set of rules concerning disclosure, including the disclosure of information from the competition authorities; (iii) specific limitation periods for antitrust damages actions; (iv) a special regime for leniency applicants as far as it concerns the disclosure of information and related to joint and several liability; (v) a special regime for SMEs; and (vi) a regime to make consensual dispute resolution more attractive.

As stated in the Green Paper, one of the main incentives for drafting the Antitrust Damages Directive was the protection of consumers.[767] The Green Paper and White Paper make explicitly clear that, especially for consumers, receiving compensation can be difficult, as the damage they have suffered is often limited (scattered damages), and starting individual proceedings is unlikely in such an event. For political reasons, some of the issues mentioned are not addressed. For example, no solutions have been provided for collective redress and representative actions. It should be noted however that the Member States without a collective action system with the option of claiming damages will likely acquire such a system in the near future. The European Commission has put collective actions on the European agenda and is pushing for such a regime in the Member States.

If there is an optimum of private enforcement, and all — or at least a significant part of damages — is compensated in future, it is even likely that the impact of the damages to be paid will often outweigh the financial implications of the administrative fines to be paid. It implies that considering 'damages as risk' becomes more apparent when considering to apply for leniency on the basis of the cost-benefit analysis. Because of this effect of an upcoming private enforcement, the (other) main incentive for drafting the Antitrust Damages Directive was to coordinate public and private enforcement. The European Commission's fear that an upcoming private enforcement (and disclosure of leniency information) could jeopardize the leniency policy was shared by the CJEU, the Member States, (legal) practitioners and scholars. Several economists demonstrated with their research and models that private antitrust damages claims jeopardize the effectiveness of the leniency programme and that the European Commission's fear is justified. They conclude that the private enforcement claims jeopardize the leniency policy if no measurements are taken to protect the leniency policy.

The Antitrust Damages Directive includes provisions that should protect the leniency policy. Of the proposals to protect the leniency programme, the following have

767. European Commission 2005 (Green Paper on Damages Actions), pp. 3 and 7-8; European Commission 2008 (White Paper on Damages Actions), p. 4.

been partly incorporated into the Antitrust Damages Directive: the exclusion of discoverability of the leniency statement and the partial removal of joint liability for the leniency applicant with immunity. An additional solution (i.e. the leniency applicant would also receive a rebate on the damages awarded in the civil case), which was widely criticized by several Member States, was not included in the final text of the Antitrust Damages Directive.

In Chapter 6, the creation of the provisions of the Antitrust Damages Directive, especially with regard to the provisions that potentially affect the effectiveness of the leniency policy, will be evaluated and compared with the previous legal structures in Germany and the Netherlands. Moreover, the system set out in the Antitrust Damages Directive will be compared with the American system. Comments on the expected effect of the Antitrust Damages Directive and some critique on the suggested solutions will also follow in that Chapter.

Chapter 4

Private Enforcement in Germany and the Netherlands

4.1 Introduction

As described in Chapter 3, the Antitrust Damages Directive is designed to ensure that private enforcement becomes a usable tool in Member States for victims of competition law infringements and to protect the effectiveness of the overall leniency programme. The Antitrust Damages Directive is the European Commission's attempt to ensure that victims are able to claim damages. In addition, the European Commission is seeking to create a uniform basis for private enforcement rules and principles in all Member States.

The objective of this chapter is to describe private enforcement as known in Germany and the Netherlands until recently. First, it describes the legal frameworks in Germany and the Netherlands and how these systems functioned before the Antitrust Damages Directive was implemented. Also, an overview of the (old) systems of other European countries is described briefly. Afterwards the changes in Germany and the Netherlands, as a result of the adaption of the Antitrust Damages Directive will be discussed, to the extent relevant for this study.

Whether private enforcement (potentially) jeopardizes the effect of the leniency policy depends *inter alia* on the extent to which private enforcement plays a role in daily practice and whether damages have to be paid.[768] If private enforcement turns out to be merely a paper tiger, it is not expected that leniency applicants will incorporate the risk of civil litigation into their assessment of whether or not to apply for leniency. If private enforcement is considered effective in claiming damages, it is likely that cartel infringers will take the risk of damages claims into account in the cost-benefit analysis conducted in order to decide whether or not to apply for leniency.[769]

768. See Section 3.3.2.2.
769. See Section 2.2.3.1 and 3.3.2.2.

The main element of the study is the relationship between the leniency programme and private enforcement. Although the abuse of dominance by undertakings is also relevant to private enforcement, it is less relevant to this study as the leniency programme only applies to cartel infringements, and not to infringements regarding abuse of dominance. For that reason, in this study there is a strong focus on cartel infringements and only modest attention is given to private enforcement in relation to abuse of dominance.

4.2 Private Enforcement in Germany Prior to the Antitrust Damages Directive

4.2.1 Introduction

The German competition act is called the Act against Restraints of Competition (ARC).[770] In Germany, private enforcement actions can commence in the civil courts. Claims can be brought under either German or EU competition law.[771] Cartel infringement can be based on Article 1 of the ARC and Article 101 of the TFEU. Regarding abusive behavior by dominant undertakings, claims can be based on Articles 19 and 20 of the ARC and Article 102 of the TFEU.

On 1 July 2005, the seventh amendment to the ARC became effective. The main objective of amending the law was to bring German law more in line with European competition law, and more specifically in line with Regulation No 1/2003.[772] The amendments to the ARC also related to civil claims for damages, for which the legal basis was provided in an amended Article 33 of the ARC.[773] The German legislature introduced the new provision to enforce private enforcement actions, especially in cartel cases, to protect competition on the markets and as additional means of compensating losses instead of the standard provision found in Article 823(2) of the German Civil Code (GCC).[774] The German legislature has thereby taken into consideration the main principles stated in the case of *Courage v Crehan* and what was discussed in the Green Paper. The amended Article 33 of the ARC deals with many of the aspects discussed, and difficulties signaled in, the Green Paper.[775]

In 2013, German lawmakers amended the ARC to some degree, which strengthened the position of consumer protection associations in terms of their participation in antitrust enforcement actions. Certain institutions were allowed to bring actions for injunctive relief or the skimming off of economic benefits in the case of mass and dispersed damages. As was the case in the past, only the affected parties can claim damages. A system for collective redress remained outside the system of the German antitrust damages claims regime.[776]

770. Gesetz gegen Wettbewerbsbeschränkungen ("GWB").
771. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 74.
772. Wurmnest 2005, p. 1173.
773. Ibid, p. 1180; Dietrich, Gruber & Hartmann-Rüppel 2009, p. 74.
774. Bürgerliches Gesetzbuch ("BGB"); Dietrich, Gruber & Hartmann-Rüppel 2009, p. 73.
775. *Cf.* Müller 2010, p. 131. *Cf.* Dietrich, Gruber & Hartmann-Rüppel 2009, pp. 74-75.
776. Besen, Schütze, Von Graevenitz 2013, p. 4.

In 2016, the German government provided a draft of a new, adjusted ARC, *inter alia* to implement the provisions of the Antitrust Damages Directive.[777] Although the Antitrust Damages Directive had to be implemented by the end of 2016, it was not part of German legislation until June 2017. It did not mean that the Antitrust Damages Directive was irrelevant in Germany. National courts were already obliged to apply the harmonious interpretation, whenever they were able to do so.[778] It meant that national courts should interpreted national law provisions in conformity with the Antitrust Damages Directive.[779] In June 2017, the new ARC, including the Antitrust Damages Directive provisions, became part of German legislation.

This section starts with a description of the *status* of private enforcement in Germany prior to the implementation of the Antitrust Damages Directive. Subsequently, attention is given to the subjects that the European Commission discussed comprehensively in its Green Paper and White Paper, together with the elements described in the Antitrust Damages Directive from a German perspective. Specifically, the following items are discussed as they could be relevant for the effectiveness of the leniency programme: (i) the right to damages and collective redress; (ii) disclosure of evidence; (iii) the passing-on of overcharges; (iv) the effect of (national) decisions; (v) the limitation period, and (vi) the Masterfoods defense. The section ends with an interim conclusion regarding the effectiveness of German private enforcement.

4.2.2 The State of Private Enforcement in Germany prior to the Antitrust Damages Directive

4.2.2.1 *Introduction*

Article 33 of the ARC empowered victims of cartel infringers to claim damages under the ARC and Articles 101 and 102 of the TFEU.[780]

At the start of 2018, most pending cases in Germany were so-called follow-on cases. Examples of large damages cases pending in Germany are cartel cases relating to air cargo, car glass, cement, coffee, elevators, hydrogen peroxide, paper, railway tracks and refrigeration compressors. In most of these cases, the competition authority was assisted in detecting or proving the cartel infringement by at least one of the cartel infringers.[781] The 100 percent fine reduction that was often granted shows that in most cases the competition authority was previously not aware of

777. Zuehlke 2017, p. 165.
778. Hartkamp, Sieburgh & Devroe 2017, pp. 6-7.
779. Ibid.
780. Immenga & Mestäcker 2014, § 33, para 8.
781. Air Cargo: Lufthansa was granted a 100 percent reduction of the fine; Car Glass: the Commission started the cartel investigation following a tip-off from an anonymous source; Asahi / AGC Flatt Glass was granted a 50 percent reduction of the fine; Cement: Readymix AG disclosed the cartel to the BKartA; Elevators: Kone was granted a 100 percent reduction of the fines for the Belgian and Luxembourgish cartel and Otis received a 100 percent fine reduction for the Dutch cartel; Hydrogen Peroxyde: Degussa AG received a 100 percent fine reduction; Railway track: Voestalpine AG applied for leniency and was granted a reduction of the fine; Refrigeration compressors: Tecumseh was granted a 100 percent reduction of the fine.

the cartel or not able to prove the cartel infringement without the help of a leniency applicant.

It can easily be concluded that the public enforcement cases in Germany depend heavily on the leniency programme, and the civil damages actions follow afterwards. That shows the importance of leniency applications for the public prosecution process and also for the compensation of cartel victims.

4.2.2.2 *Statutory Context*

Article 33(1) of the ARC provided that whoever violates (*inter alia*) the cartel or abuse-of-dominance prohibitions in the ARC and Article 101 or 102 of the TFEU has an obligation to the person affected to remediate and, in the case of a danger of recurrence, to refrain from committing the violation. Injunctive relief is already available when an infringement is foreseeable. The affected persons are competitors or other market participants impaired by the infringement.

Article 33(2) of the ARC stated that claims made pursuant to Article 33(1) of the ARC may (if they have legal capacity) also be asserted by associations for the promotion of commercial or independent professional interests, if they have a significant number of member undertakings selling goods or services of a similar or related type on the same market, and if they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and the infringement affects the interests of their members. The amendment of the ARC in 2013 allowed certain institutions to bring actions for injunctive relief or for the skimming-off of economic benefits in the case of mass and dispersed damages. As was the case in the past, only the affected parties may claim damages, and collective redress remained inadmissible.[782]

Article 33(3) of the ARC provided that whoever intentionally or negligently commits an infringement pursuant to Article 33(1) of the ARC is liable for the damage arising from it.
Interest is payable on the compensation owed, starting from the time the damage occurred.

The fourth prong of Article 33 of the ARC provided that, if damages are claimed for an infringement, the court is bound by the finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the European Commission or the competition authority (or court acting as such) in another Member State of the European Union. The same applied to such findings in final judgments resulting from appeals against these decisions.

German lawmakers also implemented a special limitation period provision. Article 33(5) of the ARC stated that the limitation period for commencing a claim under Article 33(3) of the ARC is suspended if proceedings are initiated either by the cartel

782. Besen, Schütze & Von Graevenitz 2013, p. 4.

authority for infringement within the meaning of Article 33(1) of the ARC, by the European Commission, or by the competition authority of another Member State.

Article 33 of the ARC appeared to be successful. With the introduction of the revised paragraph, the legal framework conditions have been substantially improved for claimants, and significantly more claims for damages have been brought to court.[783] The surveys of the German competition authority (called *Bundeskartellamt* or "BkartA") show that more and more victims of antitrust infringements started legal actions against the companies involved in cartel cases and are enforcing their rights by means of civil litigation.[784]

4.2.2.3 *Practice*

The introduction of Article 33 of the ARC was an attempt to resolve potential difficulties for plaintiffs in civil litigation and to make the rules concerning the matter more transparent. The aim of German lawmakers was to ensure effective compensation and deterrence. For example, with the adjusted Article 33(4) of the ARC, it became clear that the court is bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the BKartA, the European Commission, or a competition authority or court acting as such in a Member State of the EU. The same applied to such findings in final judgments resulting from appeals against decisions pursuant to these decisions. Article 33(5) of the ARC suspended the limitation period of a claim for damages if proceedings are initiated by the BKartA, the Commission, or a competition authority in one of the other Member States of the EU for possible cartel infringements. Additionally, German lawmakers tried to provide a solution for the passing on defense. Under Article 33(3) of the ARC, it was not sufficient for a defendant in a damages proceeding to state that there is no harm because the good or service purchased at the excessive price was resold, which should not be interpreted to mean that the passing on defense is precluded.[785] It implied that it is up to the defendant to prove that the damages are lower because the plaintiff fully or partly passed them on to its purchasers. The differing decisions concerning this defense will be analyzed later.

Within German academic circles, Article 33 of the ARC and private enforcement are discussed extensively in the context of the decided cartel cases. Many published cases concerning Article 33 of the ARC relate to the abuse of dominant positions and regulatory issues, most of which concern energy regulation. For this study, these are of limited relevance, so the discussion below focuses on the cartel cases.[786]

One of the cases regarding cartel damages claims that has often been discussed in the recent past is one involving cement manufacturers.[787] The aim of CDC, the

783. *Cf.* Müller 2010, p. 234; Bundesregierung 2009, p. IX; Dietrich, Gruber & Hartmann-Rüppel 2009, p. 73; Bundeskartellamt 2008, p. 33; International Competition Network 2007, p. 2.
784. Bundeskartellamt 2008, p. 33.
785. BGH 28 June 2011, KZR 75/10, point 29 et seq, especially point 44 et seq.
786. See also Section 4.1.
787. LG Düsseldorf 21 February 2007, 34 O (Kart) 147/05; OLG Düsseldorf 14 May 2008, VI-U (Kart) 14/07; BGH 7 April 2009, KZR 42/08.

plaintiff, was to enforce claims by commercial consumers against parties because of antitrust law violations. CDC pooled these claims by acquiring the debt assignments and accepted the risk and cost of the claims.

Briefly, the defendants were six cement manufacturers that had set up and maintained a nationwide cement cartel. As the assignee of the claims, CDC claimed damages for antitrust violations in the amount of more than EUR 100 million. The case is important for several reasons. First of all, the district court made clear that CDC was, after a valid assignment, entitled to claim damages on its own behalf and at its own expense and risk because of the antitrust violations. Hence, the claim vehicle/funder was able to collect the claims by buying them from the victims of the cartel and starting antitrust violation proceedings in Germany on its own behalf.[788] Furthermore, the court dealt with the issue of jurisdiction. It made clear that every district court in Germany had jurisdiction in the case of accused offenders being suspected of participating in a nationwide cartel.[789] In this case, it was also decided that the lack of clarity about the exact amount of damages attributable to the complexity of the computation was no reason to dismiss the case. An estimation of the amount of the damages was sufficient to pursue the proceedings.[790]

The court of appeal confirmed the decision of the lower court, holding that the procedural objections of the defendants (i.e. lack of jurisdiction, the inability of the court to assess the amount of damages definitively, and the lack of entitlement of CDC to take legal action) were unfounded.[791]

4.2.3 German Private Enforcement System Prior to the Antitrust Damages Directive

4.2.3.1 *Introduction*

The European Commission concluded in its Green Paper[792] and White Paper[793] that some legal bottlenecks within the Member States still had to be eliminated in order to achieve a more effective private enforcement system in Europe. The German private enforcement legislation and practice that was until recently applicable are analyzed below, including a review of these bottlenecks identified by the European Commission. These are then compared with the Antitrust Damages Directive, which seeks to provide several solutions for the identified bottlenecks.

4.2.3.2 *Right to Damages and Collective Redress*

Under Article 33 of the ARC, standing was exclusively provided to affected parties of the competition infringements and associations for the promotion of commercial

788. LG Düsseldorf 21 February 2007, 34 O (Kart) 147/05, point 77.
789. Ibid, points 55, 59-61.
790. Ibid, point 73 et seq.
791. OLG Düsseldorf 14 May 2008, VI-U (Kart) 14/07.
792. European Commission 2005 (Green Paper on Damage Actions).
793. European Commission 2008 (White Paper on Damage Actions).

interests.[794] Article 33(1) of the ARC defines affected parties as competitors or other market participants impaired by the competition law infringement. Article 33(1) of the ARC stated that any affected party may demand removal or injunctive relief from a party that has infringed provisions of the ARC, Article 101 or 102 of the TFEU, or an injunction issued by the cartel authority. Furthermore, Article 33(3) of the ARC provided a remedy for damages in the case of the tortfeasor acting intentionally or negligently.

Under Articles 830 and 840 of the GCC, cartel infringers are jointly and severally liable for the damages caused by the cartel infringement.

German law does provide for the transfer of damages claims to third parties who may then enforce the claims collectively.[795] In the aforementioned cartel case concerning the cement sector, this was accepted for the first time.[796]

Regarding acquiring claims from cartel victims, an important decision was made on this issue by the district court of Düsseldorf in a matter between CDC and the cement producers that followed the abovementioned decision of the court of appeal over an interlocutory judgment of the first instance.[797] It is an example of the general problem that the validity of the assignment is often the center of discussion and can also be decisive. CDC bought the claims for EUR 100 plus a variable component in return. The variable component was dependent on the outcome of the proceeding. The court rejected the claim by CDC. It held that the assignments of the claims to CDC were legally void under Article 134 of the GCC read in conjunction with Article 1, para. 1, sentence 1, of the German Legal Advice Act (*Rechtsberatungsgesetz* old version) and Article 138 of the GCC respectively.[798] The district court regarded the former assignments invalid pursuant to Article 134 of the GCC because CDC had no license for debt collection, which would have been necessary under Article 1, paragraph 1, sentence 1, of the German Legal Advice Act, which was in force until end of June 2008.[799] Regarding the renewed assignments afterwards, CDC did not have sufficient financial means according to the court. The district court explained that a party violates public policy (thus triggering the application of Article 138 of the GCC) when it deprives the defendants of their rights to recover statutory attorney's fees from the claimant if the claim is rejected.[800] On appeal, the Düsseldorf court of appeal confirmed the decision of the district court.[801]

Under Article 33(2) of the ARC, associations were also able to bring actions for injunctive relief or for the skimming-off of economic benefits in the case of mass and dispersed damage. Damages can only be claimed by the affected parties. As said, class actions for damages remain inadmissible.[802] Legal scholar Wurmnest

794. Wurmnest 2005, p. 1187.
795. Zuehlke 2017, pp. 171-172.
796. OLG Düsseldorf 14 May 2008, VI-U (Kart) 14/07, WuW/E DE-R 2311-2317.
797. LG Düsseldorf 17 December 2013, 37 O 200/09 (Kart) (*CDC v Cement producers*).
798. Ibid, point 57 et seq.
799. Ibid, point 67 et seq.
800. Ibid, point 96 et seq. See also Kuijpers *et al.* 2015, p. 8.
801. OLG Düsseldorf 18 February 2015, Az. VI U 3/14 (*CDC v Cement producers*).
802. Besen, Schütze & Von Graevenitz 2013, p. 4.

questions whether private associations will step in, as they are under an obligation to transfer the collected profits to the Federal Treasury, and thus do not have a proper economic incentive to sue.[803]

Under Regulation No. 2015/2421, victims can claim rather easily for damages up to EUR 5,000.[804] It is also possible to combine claims of different victims. The European small-claims procedure only applies to cross-border cases. These are cases in which at least one of the parties is domiciled or habitual resident in a Member State other than the Member State of the court where the action is brought under this Regulation. It is not possible to claim damages if there is no cross-border element. The practical relevance of this Regulation for cartel claims seems to be limited. Consumers and small and medium-sized enterprises often buy products from undertakings incorporated in the same Member State. It is likely that a cross-border element is not necessarily present and thus a proceeding under the Regulation is not possible. Moreover, the maximum value of the dispute as a threshold (EUR 5,000) is limited.[805] It is likely that victims of cartels, often entailing continuous infringements for many years, suffer a much higher amount of damages.

4.2.3.3 *Disclosure of Information*

As discussed in Section 2.4.3.4 there are several methods of obtaining information about a cartel. Via civil procedural provisions a private party could successfully request for information. Moreover, in Germany civil courts could receive information from other authorities directly. In the German Code of Civil Procedure ("CCP"),[806] the five categories of evidence used to establish the relevant basis for deciding a case are as follows: (i) legal inspection; (ii) witness testimony; (iii) expert testimony; (iv) the hearing of the parties; and (v) documentary evidence.

Prior to the implementation of the Antitrust Damages Detective, German private competition law did not provide specific tools to force a defendant to disclose information to the claimant.[807] In particular, there was no basis for a claimant to invoke far-reaching pre-trial discovery rights.[808] The system did not provide for discovery of facts that are not already known to the claimant and thus need to be investigated. Actually, in Germany there were only limited circumstances where one can require an opposing or third party to produce documents or give statements. In practice, the options did not play a significant role in the German legal process.[809]

Article 242 of the GCC could provide a general accessory claim, which could be helpful, especially in follow-on lawsuits in determining the level of causal harm.[810]

803. Wurmnest 2005, p. 1187.
804. Regulation No 2015/2421 (successor of Regulation No 861/2007).
805. *Cf.* Kramer 2014, p. 100.
806. Zivilprozessordnung.
807. Zuehlke 2017, p. 170. See also Dietrich, Gruber & Hartmann-Rüppel 2009, p. 86.
808. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 86.
809. Ibid, pp. 77-78.
810. Ruster 2017, p. 153.

The conversion of this material right to procedural law is described in Articles 422 and further CCP.[811]

Pursuant to Article 142 *ff* of the CCP, German courts may order a party or a third party to submit documents in its possession *ex officio*.[812] Article 142 of the CCP does not authorize a party to conduct a fishing expedition for the purpose of gaining access to documents that may lead to further evidence.[813] The precondition for the order was a conclusive presentation based on concrete facts. In practice, courts imposed high demands on the concretization.[814] The requesting party's interest in providing the documents must be balanced against the interests of the other party in not providing them.[815] If a party disobeys the order to provide a document, the court can draw its own inferences and take the refusal into consideration when assessing the facts of the case.[816]

In practice, the provisions provided only limited instruments for collecting evidence. The methods of obtaining information are limited because of the relatively strict conditions under which information has to be disclosed. In practice, it remained difficult to receive information and documents. Particularly in stand-alone actions, obtaining the information needed for civil proceedings was a hurdle.

Prior to the implementation of the Antitrust Damages Directive, civil courts were able to obtain the files of the BKartA and the public prosecutor's office pursuant to Article 273 (2) 2 CCP Article 474 (1) Code of Criminal Procedure, § 46 (1) Code of Administrative Offences and for the transmission of the Commission files.[817] The transfer could only take place after the civil action was brought. It implies that it was not suitable for the preparation of the claim for damages.[818] The injured party is not entitled to the use of the official files. It is at the discretion of the court, whether or not information could be used. In practice, courts made little use of this possibility.[819] There is an interesting case about the provision however.

The court of appeal in Hamm held that public prosecutors have to refer their files to the civil courts requesting them.[820] The defendants argued that the public prosecutor was not allowed to provide the information to the court. The court of appeal held that the prosecutor did not have discretion in this matter and concluded that there were no grounds to reject a request to refer the files to the civil courts. It is up to the civil court to decide whether and to what extent the claimants receive access to the file and which information can be used.[821] According to the court of appeal, it is up to the civil court, and not the public prosecutor, to balance the in-

811. Ruster 2017, p. 157.
812. Ibid.
813. Ibid.
814. Ibid.
815. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 78.
816. Ibid. See also Ruster 2017, p. 157.
817. Ruster 2017, pp. 148-149.
818. Ibid.
819. Topel 2016, § 50, nr 155. See also Ruster 2017, p. 149.
820. OLG Hamm 26 November 2013, III-1 Vas 116-120/13.
821. Kuijpers *et al.* 2015, p. 7.

terests of protecting public enforcement and providing effective damages claims as stated in the case *of Bundeswettbewerbsbehörde v Donau Chemie*.[822] In 2014, the German federal court of justice rejected the objections against the decision of the court of appeal.[823] The federal court of justice noted that the civil court must ensure that all relevant aspects and interests are accordingly taken into account and balanced in a transparent manner.[824]

4.2.3.4 *Passing-on Defense*

Compensation for more than the actual loss is normally precluded in Germany.[825] Some experts have strongly argued in favor of incorporating a clear-cut prohibition of the passing-on defense in the amended Article 33 of the ARC, as they regard this as necessary for the proper functioning of private enforcement.[826] According to most of these scholars, victims should be prevented from being able to claim damages in the amount of their actual loss because the passing-on defense could make it rather difficult to successfully claim damages.[827]

In 2003, the Mannheim district court ruled that cartel infringers are not liable towards direct purchasers in the event of plaintiffs passing-on the higher prices to downstream purchasers.[828] The Karlsruhe court of appeal adopted these conclusions and further presumed that direct purchasers will regularly be able to pass-on the inflated prices to the downstream purchasers.[829]

After being amended in 2005, Article 33(3) of the ARC states that if a good or service was purchased at an inflated price, the existence of damage is not precluded because the good or service was resold. Legal scholar Wurmnest stated that the new law does not categorically exclude the possibility of offsetting benefits resulting from the resale in cases in which direct purchasers managed to pass-on the higher prices to indirect purchasers.[830]

With the amendment, the legislators tried to find a balance between a realistic path for victims of cartel infringers to claim for damages without being deterred by a possible passing-on defense of the defendant on the one hand, and on the other hand the legal principle of limitation of damages for plaintiffs to the full compensation of a victim's damages for financial loss and lost profits.

In a decision related to the Ready-mix concrete cartel, the Berlin court of appeal decided on the issues of how to compute the amount of damages and the passing-

822. OLG Hamm 26 November 2013, III-1 Vas 116-120/13. See also Kuijpers *et al.* 2015, p. 7.
823. BGH 6 March 2014, BvR 3541/13.
824. Kuijpers *et al.* 2015, p. 8.
825. *Cf.* Glöckner 2007, pp. 492-493.
826. Wurmnest 2005, p. 1184.
827. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 83, under b.
828. LG Mannheim 11 July 2003, 7 O 326/02, GRUR 2004, 182, 184. See more Wurmnest 2005, p. 1183.
829. OLG Karlsruhe 28 January 2004, 6 U 183/03, NJW 2004, 2243, 2244. See more Wurmnest 2005, p. 1183.
830. Wurmnest 2005, p. 1184.

on defense.[831] The court describes the way in which damages are to be calculated. The general principle is that the price actually paid is to be compared with the price that would apply in absence of a cartel. The difference constitutes the damages for the plaintiff.[832] If there is not enough factual evidence for a precise calculation of the damages, pursuant to Article 287 of the CCP, the court must estimate the price that would apply if there was no cartel.[833]

Prior to the amendments of Article 33 of the ARC, the Mannheim district court and the Karlsruhe court of appeal had decided that the passing-on defense was admissible and the plaintiffs had the burden of proof with regard to the level of damages.[834] However, according to the Dortmund district court, which categorizes the passing-on defense as a case of setting-off of benefits, it was up to the defendant to prove that the plaintiff was able to pass-on the overcharge, as the defense would benefit the defendant.[835]

The Berlin court of appeal decided otherwise. The court set out that the passing-on defense is not permissible under German law and also does not work under Article 33(3) of the ARC.[836] The Berlin court of appeal creatively solved problems with the passing-on defense for defendants and claimants by allowing direct and indirect purchasers to be joint and several creditors, with the effect that a single creditor (e.g. the direct purchasers) can claim the entire loss (i.e. the damage suffered by the direct and indirect purchasers) from the cartelist, and is then obliged to compensate the other victims.[837] As a result, the amount of damages claimed by the plaintiff will not be reduced by the overcharges charged to its own purchasers.[838] Several legal scholars have analyzed the passing-on and joint-and-several liability creditor solutions of the Berlin court of appeal. Kamann and Ohlhoff, for example, hold that the joint creditor solution of the court is not an ideal solution. According to them, its weakness lies in its doctrinal inconsistency and complexity.[839] It is questionable, for example, how indirect purchasers will receive their damages from the plaintiff, especially in cases where the direct plaintiff reaches a settlement. Realistically, the direct result could well be that the plaintiff is overcompensated. Other people in the field are of the opinion that the passing-on defense should be allowed as they emphasize that it is a basic legal principle that one should be obliged to pay damages only to compensate for the harm actually suffered (the so-called compensatory principle).[840]

831. KG Berlin 1 October 2009, 2 U 10/03 (Kart). The Federal Court of Justice (BGH) found that there was no reason to admit an appeal on points of law (BGH 08 June 2010, KZR 45/09).
832. KG Berlin 1 October 2009, 2 U 10/03 Kart, point 31.
833. Ibid, point 37.
834. LG Mannheim 11 July 2003, 7 O 326/02, GRUR 2004, 182, 184 and OLG Karlsruhe 28 January 2004, 6 U 183/03, NJW 2004, 2243, 2244.
835. LG Dortmund 1 April 2004, 12 O 55/02 Kart.
836. KG Berlin 1 October 2009, 2 U 10/03 Kart, WuW/E DE-R 2773 – 2788, point 95 et seq.
837. KG Berlin 1 October 2009, 2 U 10/03 Kart, WuW/E DE-R 2773 – 2788.
838. Ibid, points 95 and 103.
839. Kamann & Ohlhoff 2010, pp. 303-320.
840. See for example Bechtold 2010, pp. 296-297.

As stated, in Germany the general rule in assessing damages is to provide full compensation. The decisions of the CJEU also make clear that full compensation should be provided to the victims of a cartel.[841] It can also be concluded that there is no ground for an overcompensation of direct victims. The passing-on defense should therefore be available for defendants.

In 2010, the Düsseldorf court of appeal ruled that the passing-on defense was available in a case relating to regulatory markets where Article 33 of the ARC did not apply.[842] The court of appeal stated that anyone affected by antitrust violations should, in principle, on the basis of decisions of the CJEU, be able to claim damages.[843] If the overcharges have been fully or partly passed-on to indirect purchasers, the claims made by direct purchasers for this part of the harm should realistically not be successful.[844] The Düsseldorf court of appeal regarded it as established from the proven facts that the claimant had taken the overcharges into account in its own price calculations. The court of appeal accepted the passing-on defense. The court held that the claimant's general denial of having passed on the overcharges was not sufficient for a substantive denial.[845]

In the ORWI case in 2011, the German federal court of justice clarified the rule on the passing-on defense. The federal court of justice held that to assign the burden of proof to the defendant was consistent with the general rule that the party benefitting from a fact has to prove it.[846] The federal court of justice stressed the necessity of an adequate causal link between the cartel infringement and the harm, and made clear that regarding this the passing-on defense was possible as a defense and had to be seen as a situation of setting-off the benefits.[847] According to the federal court of justice, the defendant had the onus of proving that the damage was reduced as the plaintiff had (fully or partly) passed the damage on to its own purchasers.[848] That the federal court of justice assigned the burden of proof to the defendant was consistent with the general rule that the party benefitting from a fact has to prove it.[849] Whereas the indirect purchaser had to prove that the direct purchasers passed-on the overcharges to it, the seller bore the burden of proof where it argued as a defendant that the claimant had passed-on the price increases to its buyers.[850]

In a later decision, the Berlin district court followed the German federal court of justice, pointing out that the passing-on defense is generally permissible as a defense and is a situation of setting-off the benefits and that the burden of proof was on

841. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*); CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*).
842. OLG Düsseldorf 22 December 2010, VI-2 U (Kart) 34/09.
843. Ibid, point 58.
844. Ibid, point 58 et seq.
845. Ibid.
846. BGH 28 June 2011-KZR 75/10.
847. Ibid, points 44, 57 et seq.
848. Ibid, point 41 et seq. especially point 44 et seq.
849. See *inter alia* Prütting 2016, § 286, point 111.
850. Kuijpers *et al.* 2015, p. 10.

the defendants.[851] It ruled though that in that specific case the passing-on defense had to be rejected. According to the court, the claimant had no downstream market to pass on the overcharge to.[852] The claimant was the owner of a subway station and had paid too much for the escalators. It leased the station to the subway operator. The court considered that as the escalators were only a small part of the cost, it was unlikely that there was a causal link between the overcharge for the escalators and the rent agreed with the subway operator.[853]

4.2.3.5 *Effect of (National) Decisions*

The first sentence of Article 33(4) of the ARC stated that if damages are claimed for an infringement of the ARC or of Article 101 or Article 102 of the TFEU, German courts are bound by a finding that an infringement has occurred to the extent that such a finding was made in a final decision by German cartel authorities, the Commission, or the competition authorities (or courts acting as such) of other Member States. A decision is thus binding only if it is established that an infringement of the ARC or Article 101 or 102 of the TFEU has occurred.[854] If a decision is appealed, the second sentence of Article 33(4) of the ARC provides for the resulting final judgement to have binding effect.[855] The Munich court of appeal stated that the legally binding effect under Article 33(4) of the ARC is limited to the finding of an infringement.[856] According to the court of appeal, there is no legally binding effect regarding other legal requirements in a damages claim. Hence, only the operative provisions of a decision are binding, and not the reasons given for the decision.[857] Hence, Article 33(4) of the ARC only relieved the claimant of proving the infringement of competition law as such.[858] All additional requirements for bringing a successful damages claim, e.g. causation of harm, and the size of harm, still have to be alleged and proven by the claimant.[859] Article 33(4) of the ARC was criticized by several scholars as being too broad. They assumed that the provision does not limit the binding effect of administrative decisions to claims that are brought against those parties who are the addressees of the infringement decision.[860] If the article is understood this way, a problem exists for example if the competition authority does not direct its procedure against all parties who are infringers, including possible infringers.[861] If A, B, and C are mentioned as infringers in the body of the decision, but the decision is directed only against A and B, it contradicts the principle of procedural fairness if a claimant in litigation can rely on Article 33(4) of the ARC against C as well. C was not involved in the cartel proceedings and thus was not able to defend itself.

851. LG Berlin 6 August 2013, 16 O 193/11 (Kart), point 65.
852. Ibid.
853. Ibid. See also Kuijpers *et al.* 2015, p. 10.
854. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 84.
855. Ibid.
856. OLG München 21 February 2013, U 5006/11 Kart and Az U 711/12 Kart.
857. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 85.
858. Ibid.
859. LG Berlin 6 August 2013, 16 O 193/11 (Kart), point 63 et seq. See also Dietrich, Gruber & Hartmann-Rüppel 2009, p. 85.
860. Dietrich, Gruber & Hartmann-Rüppel 2009, p. 85. See also Wurmnest 2005, pp. 1185-1186.
861. Ibid.

Those concerns are unfounded if Article 33(4) of the ARC is correctly understood so that its binding effect can be used only against those undertakings that were involved in the administrative proceedings and with regard to whom the authority established the existence of an infringement. An example of the correct application of Article 33(4) of the ARC is found in the decision of the Munich court of appeal.[862] The court set aside a binding finding of a cartel infringement against a party that was not addressed by the decision of the competition authority:

"*Da der Bußgeldbescheid nur die Beklagte zu 1) betrifft, fehlt es hinsichtlich der Beklagten zu 2) bis 5) bereits an einer bindenden Feststellung eines Kartellverstoßes.*"

4.2.3.6 *Limitation Period*

According to Article 195 of the GCC, the regular limitation period is three years. According to Article 199(1) of the GCC, the period starts running on expiry of the year in which the claim has arisen and the victim knew, or could have known, of the harmful event. Article 33(5) of the ARC provided for a suspension of running the limitation period if a German cartel authority, the European Commission or competition authority of another Member State initiates an infringement proceeding.

According to Article 204(2) of the GCC (to which Article 33(5) of the ARC referred), the suspension ends six months after the competition authority has made a final decision or has ended the investigation by other means. This suspension allows potential plaintiffs to await the final outcome of public investigations before filing their actions for damages in court.[863]

4.2.3.7 *Masterfoods Defense*

Pursuant to Article 16 of Regulation No 1/2003, it is prohibited for national courts to take decisions that conflict with a decision of the European Commission.[864] This Article codifies the Masterfoods judgement of the CJEU.[865]

As long as a case is pending at the European Commission or its decision has not yet become final, the national court has to examine whether to stay the proceedings in accordance with Article 148 of the CCP.[866] Article 148 CCP provides a suspension if a decision in another matter is anticipated. Where the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending, or that is to be determined by an administrative agency, the court may direct that the hearing be suspended until the other legal

862. OLG München 21 February 2013, U 5006/11 (Kart) and Az U 711/12 Kart.
863. Wurmnest 2005, p. 1187.
864. Emmerich 2014, para 87.
865. CJEU 14 December 2000 (*Masterfoods v HB Ice Cream*), point 52.
866. Schmidt 2012, para 28. See also Hoffmann 2014, para 142; Emmerich 2014, para 88.

dispute has been dealt with and terminated, or until the administrative agency has issued its decision.

Bornkamm notes that the national court is obliged to stay the proceedings.[867] In German case law, using the Masterfoods as a defense to delay national court proceedings does not seem to play an important role. Publicly available decisions of the courts do not show lively discussions between claimants and defendants on how to proceed in the proceedings in cases in which the decision is not final yet.

4.2.4 Conclusions

Article 33 of the ARC, with the elements also mentioned by the European Commission in the Green Paper and White Paper, appeared to a large extent to be in line with the Antitrust Damages Directive. In line with the Green Paper, White Paper and the Antitrust Damages Directive, German courts were bound by the determination of competition law infringements by authorities, the passing-on defense was acknowledged and the burden of proof lied on the defendant. Article 33 of the ARC also provided a special suspension of the limitation period if there was also an administrative proceeding underway.

In fact, German lawmakers anticipated the adoption of a directive. The special provisions appeared to make it easier for claimants to claim compensation and appeared to make the German private enforcement system attractive and popular for claimants, although it remained difficult to collect information. Several follow-on cases have been filed using the new private enforcement system.[868] After 2005, the number of civil claims increased substantially. If these indications are not deceiving us, this is a good portent for the Member States where the policy of the Antitrust Damages Directive had to be incorporated into the national legal system by the end of 2016. Because of the Antitrust Damages Directive, German lawmakers had to amend Article 33 of the ARC to some extent. For example, the suspension of the limitation period had to be expanded. Also, special liability rules for leniency applicants and SMEs were missing. Furthermore, additional disclosure provisions had to be implemented. The amendments necessary, will be discussed in more detail in Section 4.6.

Collective redress in Germany, especially for small claims, appears hardly feasible. Germany lacks the option of collective redress for cartel victims. Associations may claim damages, but only in a financially unattractive way. There are ways to assign claims, although the validity of the assignment could be problematic.

Concerning the position of the leniency applicant in German civil proceedings, the following can be concluded. In Germany, public enforcement cartel cases are almost always uncovered by the leniency application(s). The public enforcement case appears in almost every case the start of the civil proceedings. Hence, private enforcement cartel cases are standard so called 'follow-on' cases. It implies, in fact, that

867. Bornkamm 2003, p. 85. *Cf.* Bartels 2002, pp. 83-94.
868. See Section 4.2.2.1. See also Kuijpers *et al.* 2015, pp. 1 and 14.

applying for leniency could very well lead to antitrust damages claims in Germany. These damage claims could have been substantial, also for the leniency applicants as infringers are jointly and severally liable for the cartel damage, including leniency applicants.

Under the (old) German provisions prior to the implementation of the Antitrust Damages Directive, the leniency applicant was an interesting party to sue because it is jointly and severally liable and it already confessed its participation in the cartel to the competition authority. Moreover, other characteristics probably made the leniency applicant an even more useful first target for claimants. The limitation period towards the leniency applicant could end earlier (the extra limitation period of Article 33(5) could end earlier for the leniency applicant), which could result in claimants starting to claim from the leniency applicant at an earlier stage. The Masterfoods defense could have a similar negative effect. The leniency applicant who does not appeal the decision will have a final and irrevocable decision of the competition authority prior to the infringers that do appeal the decision. It potentially has the effect that claimants focus on the leniency applicants from which the decision is final and irrevocable.

4.3 Private Enforcement in the Netherlands Prior to the Antitrust Damages Directive

4.3.1 Introduction

As in Germany, in the Netherlands it was possible to bring proceedings in the civil courts because of competition law infringements, also prior to the implementation of the provisions of the Antitrust Damages Directive.

In the Netherlands, however, the number of cases in which private enforcement has come into play has been smaller, and competition law actions were often used only as a side-path; plaintiffs did not intend to claim damages in the first place.[869] In the case law, for example, it has often been the case that the plaintiff was seeking to absolve itself of its contractual obligations with the help of competition law legislation. This is possible with Article 101 of the TFEU and Article 6 of the Dutch Competition Act ("DCA"),[870] as the second prong of these articles stipulates that a contract infringing competition law is void.

Until recently, there were only a couple of Dutch cases in which plaintiffs claimed damages from cartel infringers.[871] However, the number of damages claims has grown substantially.[872]

Sections 4.3.2 and 4.3.3 discuss the legal framework of private enforcement in the Netherlands as how it was prior to the implementation of the Antitrust Damages Directive. Section 4.3.3 considers the points of particular interest in greater detail,

869. *Cf.* Kuijpers *et al.* 2015, p. 10.
870. Mededingingswet.
871. Zippro 2009, pp. 163-164. See also Hettema 2004, p. 110.
872. Cornelissen *et al.* 2017, p. 264. See also Van Lierop & Pijnacker Hordijk 2007, p. 6.

often points that have also been considered by the European Commission in the Green Paper, White Paper and the Antitrust Damages Directive. Specifically, the following items are discussed because they have some kind of relation with the leniency programme: the right to damages and collective redress, disclosure of evidence, the passing-on of overcharges, effect of (national) decisions, and the limitation period. Also, the Masterfoods defense will be discussed and analyzed. At the end, an interim conclusion follows in Section 4.3.4.

4.3.2 The State of Private Enforcement in the Netherlands Prior to the Antitrust Damages Directive

4.3.2.1 *Introduction*

Competition law has played a role in the Dutch civil courts for decades.[873] However, there were only a few cases that concerned damages. Often plaintiffs intend to "void" their agreement or to prevent the exclusion of parties. It should not be concluded too quickly that civil damages claims were scarce in the Netherlands. Several cases concerning civil damages claims regarding competition law infringements have been brought to court.[874]

Over the last decade, there is a trend of more private enforcement claims being brought to court after the competition authorities have issued their first fines.[875] At the start of 2018, several of these so-called follow-on actions are still in the preliminary phase. Defendants challenge the jurisdiction of the Dutch courts and try to stay proceedings awaiting the outcomes of the appeals before the EU courts.[876]

Large-scale cases of antitrust damages actions in the Netherlands relate to the following cartels: air cargo, bitumen, flat screens, gas insulated swift gear, elevators and escalators, candle waxes and sodium chlorate.[877] All these cases are follow-on cases and in all these cases the competition authority was assisted in detecting or proving the cartel infringement by the assistance of at least one of the cartel infringers.[878] It clearly shows the direct link between leniency applications and the pos-

873. See also Maton, Poopalasingam, Kuijper & Angerbauer 2011, p. 503.
874. E.g. Rechtbank Amsterdam 30 March 1977 (*J.D. Wilkes v Theal B.V. et al.*); Gerechtshof Amsterdam 11 January 1979 (*J.D. Wilkes v Theal B.V. et al.*); Rechtbank Rotterdam 23 October 1992 (*Multi Veste B.V. Boender & Maasdam B.V. et al.*); Rechtbank Middelburg 3 July 2002 (*In re N.L. Praet en Zonen B.V. v Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA*); Rechtbank Rotterdam 28 November 2002 (*In re Van Ommeren Agencies v Gemeente Rotterdam (Gemeentelijk havenbedrijf Rotterdam)*); Rechtbank Rotterdam 7 March 2007 (*CEF CITY Electrical factors B.V.*); Gerechtshof 's-Gravenhage 24 April 2008 (*In re N.L. Praet en Zonen B.V. v Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA*) (interlocutory decision, in this case no final decision has been pronounced, according to the court administration the case has been withdrawn).
875. Mahler 2017; Cornelissen *et al.* 2017, p. 264; Kortmann 2014, pp. 664 and 669.
876. *Cf.* Kuijpers *et al.* 2015, p. 2.
877. Kuijpers *et al.* 2015, p. 2. See also Cornelissen *et al.* 2017, p. 242 and p. 264.
878. Air cargo: Lufthansa received 100 percent reduction of the fine; Bitumen: BP received 100 percent reduction of the fine; Flat screens: Samsung received 100 percent reduction of the fine; Gas insulated switch gear: ABB received 100 percent reduction of the fine; Elevator and escalator: Otis received 100 percent reduction of the fine in the Netherlands; Candle waxes: Shell received 100 percent reduction of the fine; and Sodium chlorate: AKZO Nobel / EKA Chemicals received 100 percent reduction of the fine.

sibility of claiming damages. Without leniency applications, it would appear difficult to claim damages in the Netherlands.

4.3.2.2 *Statutory Context*

Contrary to the situation in Germany, prior to the Antitrust Damages Directive there was no special regulatory framework for private enforcement of competition law in the Netherlands. The doctrine of private competition enforcement in the Netherlands apparently had to come from legal scholars, affected parties and courtrooms.

Claims that resulted from cartel infringements were often based on the legal concept of an unlawful act. Although it appears rarely, under certain conditions, claims could also be based on other legal concepts, like breach of contract, unjustified enrichment and undue payment.[879]

Wrongful Act
In most cases, Dutch damages actions were (primarily) based on a wrongful act. Article 6:162(1) of the DCC makes clear that a person who commits a wrongful act against another, with that wrong act being attributable to that person, is obliged to repair the damage suffered by the other in consequence thereof.

Article 6:162(2) of the DCC qualifies a wrongful act as a violation of a right and an act or omission in breach of a duty imposed by law or a rule of unwritten law pertaining to proper social conduct, except where there are grounds for justification. Pursuant to Article 6:162(3) of the DCC, a wrongful act must be attributable to the person committing the act. That is the case if it is his fault or if the cause was one for which he is accountable by law or generally accepted principles. The final requirement for a wrongful act is the requirement of relativity as set out in Article 6:163 of the DCC. It states that the violated standard of behavior must be intended to offer protection against damage. There is no obligation to repair the damage if the violated standard of behavior is not intended to offer protection against damage as suffered by the injured person.

In *Van Ommeren Agencies v Gemeente Rotterdam*, for example, the Rotterdam district court held that if it becomes evident that the defendant is abusing its dominant position, there is an abuse of circumstances that can be considered as a wrongful act.[880]

First, the unlawful conduct lies in the acting (against the victims) in breach with a legal obligation, being the obligation under Articles 101 TFEU and 6 DCA to refrain from concluding agreements and entering into concerted practices and which have

879. See *inter alia* Ligteringen 2016, pp. 158-165.
880. District Court (Rechtbank) Rotterdam 28 November 2002 (*In re Van Ommeren Agencies v Gemeente Rotterdam (Gemeentelijk havenbedrijf Rotterdam)*). See also Rechtbank Amsterdam (interlocutory proceedings) 16 October 2009 (*Plaintiffs/KIA Motors Nederland B.V.*); Rechtbank Amsterdam (interlocutory proceedings) 3 December 2009 (*Plaintiffs /KIA Motors Nederland B.V.*). See furthermore Zippro 2009, p. 338 et seq.; Maton, Poopalasingam, Kuijper & Angerbauer 2011, p. 504.

as their object or effect the prevention, restriction or distortion of competition.[881] Several courts have held that an infringement of competition law should be considered as a wrongful act. A breach of competition law is considered to be unlawful. It constitutes an infringement of a duty imposed by law.[882] Secondly, the unlawful conduct follows from the fact that the infringers *inter alia* fix and align prices, and as a whole do not compete with each other and the infringers act contrary to their duty of care according to generally accepted standards of behavior.[883]

With regard to the requirement of attribution, in most cases a violation of competition law will imply fault and as such be attributable to the violator.[884] Concerning the causal link between the wrongful act and the damage suffered, it is sufficient to establish the existence of a *condicio sine qua non* relationship between the infringement and the damage suffered.[885] The issue is this: what would have happened if the wrongful act had not occurred.[886]

In cartel cases, Article 6:166 of the DCC is often used in combination with Article 6:162 of the DCC. Article 6:166 of the DCC relates to collective behavior. Pursuant to Article 6:166(1) of the DCC, each of the members of a group is joint and severally liable as far as this collective behavior can be attributed to it individually.[887] Article 6:166 DCC will be further discussed in Section 4.3.3.2.

4.3.2.3 *Practice*

At the start of writing this study, private enforcement damages actions were exceptions rather than the rule in the Netherlands. However, even then the limited number of court decisions could partly be elucidated by out-of-court settlements, the terms and outcome of which remain sealed and unavailable to the public. Zippro, for example, referred to the out-of-court settlement agreed on by the construction industry and the Dutch government, the out-of-court settlement of Equens (the legal successor of Interpay) as well as the organizations representing companies that have accepted switch cards payments with "PIN".[888]

The Netherlands appears to have become one of the three favorite countries to collectively claim damages, along with Germany and the United Kingdom.[889] The

881. Zippro 2009, p. 339.
882. Asser/Hartkamp & Sieburgh 6-IV* 2015, nr. 44. See for example the cases Rechtbank Oost-Nederland 16 January 2013 (*TenneT v ABB*), point 4.7; Rechtbank Amsterdam 16 October 2009 (*Plaintiffs/KIA Motors Nederland B.V.*); Rechtbank Amsterdam (interlocutory proceedings) 3 December 2009 (*Plaintiffs /KIA Motors Nederland B.V.*). See also Braat 2013, p. 319-321; Maton, Poopalasingam, Kuijper & Angerbauer 2011, p. 504.
883. Zippro 2009, p. 340.
884. Fierstra *et al.* 2009. See also Braat 2013 p. 324; Zippro 2009, p. 343.
885. Fierstra *et al.* 2009.
886. Ibid.
887. Asser/Hartkamp & Sieburgh 6-IV* 2015, nr. 127.
888. Zippro 2009, p. 163.
889. Stancke 2017, p. 4. *Cf.* European Commission 2013 (Impact Assessment for Directive proposal), point 52.

European Commission has counted 52 actions for damages in the period from 2006 to 2012, the vast majority being brought to court in one of these three countries.[890]

One of the first cases in the Netherlands that made clear that private enforcement can lead to compensation for a competition law infringement was the case *Theal B.V. v Wilkes*.[891] Distributor Wilkes had been excluded from the sale of record cleaners in the Netherlands as a result of export prohibitions and the assignment of trademark rights precluding parallel trade. Wilkes filed a complaint with the European Commission and sued for damages. Prior to the adoption by the European Commission of a decision, the Amsterdam district court held that Theal and Watts's practice of precluding parallel imports breached Article 101 of the TFEU. The court decided that Theal and Watts had breached Article 101 of the TFEU and awarded damages to Wilkes, which had to be calculated in a separate damages assessment proceeding.[892] Theal appealed but the court of appeal confirmed the judgement.[893] Theal appealed to the Supreme Court of the Netherlands, but on 28 August 1979 it went into bankruptcy, before the Supreme Court made a decision. No final decision by the Supreme Court followed.

The case of *Multi Veste v Boender & Maasdam* was another case concerning a competition law infringement.[894] At issue was whether there was an obligation to pay a contractor the costs for calculation. Multi Veste was of the opinion that it was not obliged to pay these costs as these were the result of an agreement by the contractors among themselves and had to be considered a cartel infringement. Together the contractors had agreed to coordinate and raise their tender offers to include costs for calculation and organization costs. The court held that the payment of the costs for calculation had to be considered a cartel infringement and the clause in the contract in which payment of the costs for calculation was stated had to be considered void. The court held that Boender & Maasdam was unjustly enriched at the expense of Multi Veste and had to pay back the amount of the costs for calculation.

A more recent case is the case of *Praet v Producentenorganisatie van de Nederlandse Mosselcultuur U.A.*[895] Praet was a mussel farmer and one of the members of the Dutch Cooperative Mussel Farmers Organisation, a private association of mussel farmers (the "Association"). The Association's articles and bylaws included a regulation on the assignment of quotas for mussel seed mussels to each mussel farmer. Praet argued that this regulation was a market-sharing agreement that infringed Article 101(1) of the TFEU and Article 6 of the DCA and is therefore void. Praet claimed damages in the amount of his loss of profit, estimated at EUR 250,000 for each year he was bound by the regulation. The district court decided that there was a horizontal agreement limiting and fixing the production of the individual

890. European Commission 2013 (Impact Assessment for Directive proposal), point 52.
891. Rechtbank Amsterdam 30 March 1977 (*J.D. Wilkes v Theal et al.*); Gerechtshof Amsterdam 11 January 1979 (*J.D. Wilkes v Theal et al.*); Hoge Raad 16 January 1981 (*J.D. Wilkes v Theal et al.*).
892. Rechtbank Amsterdam 30 March 1977 (*J.D. Wilkes v Theal et al.*).
893. Gerechtshof Amsterdam 11 January 1979 (*J.D. Wilkes v Theal et al.*).
894. Rechtbank Rotterdam 23 October 1992 (*Multi Veste v Boender & Maasdam et al.*).
895. Rechtbank Middelburg 3 July 2002 (*In re N.L. Praet en Zonen v Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA*); Gerechtshof 's-Gravenhage 1 July 2004 and 24 April 2008 (*In re N.L. Praet en Zonen v Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA*).

mussel farmers. The Association had applied to the European Commission for exemption, but did not apply for exemption with the director-general of the ACM. Therefore, the regulation infringed Article 6 of the DCA and was void. The Association was held liable for Praet's damage, to be calculated in a later proceeding for the determination of damages. The Association appealed successfully. The 's-Gravenhage court of appeal decided to pose questions to the European Commission about a possible exception under Regulation 26, Article 2(1) to Article 101(1) of the TFEU based on two CJEU cases: *Delimitis v Henninger Bräu*[896] and *Dijkstra and Others v Zuivelcoöperaties*.[897] The court of appeal held that the articles of association and bylaws did fall under the exception to the Regulation and reversed the judgment. The court ruled that Article 12 of the DCA makes clear that an exception stated in a regulation means that not only does Article 101 of the TFEU not apply, but Article 6 of the DCA does not apply either.[898]

As discussed in Section 4.3.2.1, at the moment there are several cases pending. More and more claimants are aiming to obtain monetary relief for the harm suffered from the cartel infringement. It is also increasingly common for claims to be assigned to specialist companies,[899] who are often suing on their own behalf.

The most important cases regarding follow-on antitrust damages actions are the cases of *TenneT v ABB* and *TenneT v Alstom*. These cases should be considered landmark cases as they provide answers to several questions that arise in private enforcement actions. They provide clarity on points such as how to calculate the damages, the jurisdiction of the court, the value of a decision of the European Commission as evidence, the passing-on defense, the liability of subsidiaries of an infringing undertaking and the limitation period. All these elements will be further discussed in Section 4.3.3.

4.3.3 Dutch Private Enforcement System Prior to the Antitrust Damages Directive

4.3.3.1 *Introduction*

The European Commission concluded in its Green Paper and White Paper that several bottlenecks had to be eliminated in the Member States to achieve a more effective private enforcement system in Europe. In the following sections, the Dutch private enforcement practice — as known prior to the introduction of the new Antitrust Damages Directive legislation — will be analyzed on the basis of these bottlenecks identified by the European Commission.

896. CJEU 28 February 1991 (*Delimitis v Henninger Bräu*).
897. CJEU 12 December 1995 (*Dijkstra and Others v Zuivelcoöperaties*).
898. Gerechtshof 's-Gravenhage 1 July 2004 and 24 April 2008 (*In re N.L. Praet en Zonen v Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA*).
899. Kuijpers *et al.* 2015, p. 2. For example, the Irish company Claim Funding International claimed damages from the air carriers for transporting goods at excessive prices because of an alleged cartel.

4.3.3.2 *Right to Damages and Collective Redress*

Unlike the system in Germany and the United States, there were no special rules on standing for private enforcement purposes in the Netherlands. As stated earlier, damages resulting from cartel infringements were claimed in accordance with the standard damages provisions in the Dutch Civil Code. The most useful provisions are those relating to wrongful act in Articles 6:162 and 6:166 of the DCC and unjustified enrichment in Article 6:212 of the DCC.

To claim for damages, there must be a sufficient interest. Article 3:303 of the DCC, which also applies to claims based on breach of competition law, makes clear that there is no right of action without a sufficient interest.[900] There are no national statutory provisions nor is there case-law that relates to standing requirements which preclude indirect purchasers from claiming redress for an infringement of competition law.[901] This is in line with the cases of *Courage v Crehan* and *Manfredi* of the CJEU, as the CJEU has made clear that every victim of a competition infringement is entitled to redress.[902]

As a practical matter, however, there may still be one practical obstacle for victims.[903] A causal link between the unlawful act and the harm suffered had to be proved. This could turn out to be difficult, as the cartel victim had the onus of demonstrating that the competition infringement resulted in higher prices for the victim than it would have paid in the absence of the alleged violation.[904]

Some legal scholars mention the relativity requirement in Article 6:163 of the DCC as another hurdle for indirect victims of competition infringements as the competition rules violated are not intended to protect these specific groups of operators.[905] Since the decision of *Manfredi*, it has been clear that national rules on relativity are not capable of restricting individuals from claiming damages for loss caused to them by a contract or by conduct liable to restrict or distort competition.[906] According to the decision, *every* victim of a cartel, including indirect victims, should be able to claim damages.[907]

If two or more persons are individually liable for the same damage, then they are joint and severally liable, pursuant to Article 6:102 of the DCC. Infringers cause the damage resulting from the infringement together, for example, by price fixing. Pursuant to Article 6:102 of the DCC, they are, therefore, jointly and severally liable.[908] In order to assess what each of them will have to contribute, by virtue of Article of the 6:10 DCC and on account of their internal relationship with one an-

900. Fierstra *et al.* 2009.
901. Ibid.
902. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 60 et seq.
903. *Cf.* Fierstra *et al.* 2009.
904. Ibid.
905. Ibid.
906. Ibid.
907. CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 60. See also CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 26.
908. Netherlands, Parliamentary Papers II 2016/17, p. 4.

other, the damage is then imputed to them in accordance with Article 6:101 DCC, unless a different imputation results from law or juridical act.

In addition to a company being held joint and severally liable for damages because of an unlawful attributable act, a (private) person can also be held jointly and severally liable for participating in a group, where another participant has committed the actual culpable tort, such as that referred to in Article 6:161 of the DCC. Article 6:166 of the DCC is a special provision. It sets out that in a case where damage has been inflicted, a person or persons should have restricted the group from this behaviour, and thus, are jointly and severally liable. The provision seeks to prevent an individual, who has not carried out the actual harmful conduct themselves, from defending themselves on the grounds that the damage would still have occurred, even if they hadn't conducted themselves as part of the group.[909] The participation itself constitutes an unlawful act against the victim, the definition of which establishes the existence of a sufficient causal link to the harm.[910]

When acting in a group, it is relevant that a contribution was made to the conduct which gave rise to the risk of injury and the existence of a conscious act together. The chance of inflicting injury should restrict a person's participation in the joint conduct. Hartkamp and Sieburgh note, with regard to this, that this would only be the case if there was a chance that the infliction of damage could be foreseen.[911]

In October 2015, the Supreme Court ruled on the application of Article 6:166 of the DCC.[912] An insurer had demanded compensation for damage, which had been caused by a series of cargo thefts. Reference was made to a criminal conviction, which showed that the defendant had been convicted of participating in an organization that had been committing crimes with intent. The Supreme Court noted that a criminal conviction for participation in a criminal organization was not sufficient to assert the group conduct referred to in Article 6:166 of the DCC. The group conduct set out in Article 6:166 paragraph 1 of the DCC, relates not to the participation in such an organization as such, but to the concrete unlawful group actions that caused the damage.[913] The Supreme Court noted that participation in the organization and member's involvement in the wrongful acts committed by the organization, were not sufficient grounds to assert group conduct, with respect to the other organization's grounds for tort.[914] Furthermore, the Supreme Court observed that the court had rightly concluded that the various cargo thefts could not be regarded as a single group practice. This was based on the fact that the grounds for liability in Article 6:166 paragraph 1 of the DCC require that an individual knew or should have known that the group's action had, in this case, the chance of causing actual damage.[915]

909. Asser/Hartkamp & Sieburgh 6-IV* 2015, nr. 127.
910. Ibid.
911. Ibid.
912. Hoge Raad 2 October 2015 (*TVM et al. v XYZ*).
913. Ibid.
914. Ibid, point 3.5.3.
915. Ibid.

The judgment made it clear that actual personal involvement in specific illegal acts is required for the affirmation of liability under Article 6:166 of the DCC.

The question will, in many cases, be a point of order concerning Article 6:166 of the DCC, as it is necessary to redress the damage resulting from cartel infringements. As Zippro notes, an appeal from the victim to Article 6:166 of the DCC will not be needed quickly, because all the cartel participants have independently committed a wrongful act against the victim and there is a sufficient causal link between the unlawful act of the cartel participants and the victim who has suffered the cartel damages.[916] In most cases it will be sufficient to rely on the main joint and several liability provision as set out in Article 6:102 of the DCC.

A special situation arose in the case of *TenneT v ABB*, where the Commission established that the parent company had participated in a cartel and the subsidiary company concluded an agreement with the complainant TenneT (a victim of the cartel). In this case, the Eastern Netherlands court ruled that, together with the parent, the subsidiary must also have been aware of the unlawful act. The subsidiary was, therefore, together with the parent company jointly and severally liable under Article 6:166 of the DCC. According to the court, Article 6:166 paragraph 1 of the DCC was met because: (i) there was a conscious combined action amongst the various participants, with each contributing to the behaviours that created the risk of harm; (ii) both participants had the chance to foresee that the infliction of damage could arise and this should have prevented them from participating; (iii) the parts of the participants could be attributed; and (iv) there was unlawful conduct towards the victim and the damage, therefore, arose.[917] Through this, the subsidiary, even though it had not committed the cartel offence itself, was deemed jointly and severally liable for the damage.

Collective Redress

In the Netherlands, there are several legal methods and, hence, several possibilities for collective redress.

Article 3:305a of the DCC

The first set of rules is laid down in Articles 3:305a-c of the DCC and is applicable to public interest and group interest collective actions.[918] These rules provide representative organizations the possibility of representing a group in proceedings. A representative organization that starts a collective action does so on its own behalf. A declaratory judgment on liability for sustained damages can be obtained.[919] However, not all causes of action and forms of relief can be claimed in a collective action. According to Article 3:305a(3) of the DCC, an action for damages is not possible via this procedure.[920] Lawmakers were of the opinion that to award damages all kinds of questions had to be answered regarding the specific circumstances of

916. Zippro 2009, p. 359.
917. Rechtbank Oost-Nederland 16 January 2013 (*TenneT v ABB*), point 4.16.
918. Fierstra *et al.* 2009.
919. Ibid. See also Ligteringen 2016, p. 165.
920. See *inter alia* Ligteringen 2016, p. 165: Oranje 2005, pp. 289-297.

the individual claimant.[921] The court decision binds the representative organization and the defendant, not the individual victims. As there is no possibility of claiming damages under Article 3:305a of the DCC, Meijer stated that if the White Paper provision concerning collective redress were introduced in a directive, collective redress as referred to in Article 3:305a of the DCC should be amended to be in line with it.[922] Because the final version of the directive does not incorporate a process for a collective action, an amendment was not needed. As stated in Chapter 3 however, the European Commission set forth some provisions attempting to get the Member States to implement a system of collective damages actions.

Some legal scholars state that relying on other legal concepts, a compensation claim could be based on the system set out in Article 3:305a of the DCC, without claiming damages.[923] For example, a claim could arise from undue payment, or as a result of (partial) termination. This probably makes the discussion about amending Article 3:305a of the DCC, including the possibility of claiming damages less relevant. However, a claim arising from undue payment is possibly interesting for claims against a party with a dominant position, but less interesting in cartel cases as claimants often do not have a contractual relationship with several of the cartel infringers. Having said this, the Dutch government is of the opinion that compensation under Article 3:305a of the DCC is not possible. The government bases this on the assumption referred to earlier that standard compensation cannot be calculated and that every victim should be provided with compensation only for the loss it actually suffers.

Act on Collective Settlement of Mass Damages

The limited scope of Article 3:305a has been given substance with the introduction of a second set of rules called the Act on Collective Settlement of Mass Damages that makes a collective settlement generally binding (*Wet collectieve afwikkeling massaschade* ("WCAM").[924] This second set of rules is laid down in Articles 7:907-910 of the DCC and Articles 1013-1018 of the Dutch Code of Civil Procedure ("CCP"). With these rules, parties to a collective settlement agreement are able to ask the Amsterdam court of appeal for a declaration. It is not a judgment in which the courts decide on an issue, but it does make a settlement binding. Pursuant to these rules, the court of appeal is able to issue an order declaring the collective settlement binding on all eligible injured parties. Individual injured parties may, by exercising the right to opt out, withdraw from the settlement before the deadline set by the Amsterdam court of appeal.

The conditions for obtaining court approval are, *inter alia,* as follows: (i) the amount of the compensation may not be unreasonable; (ii) the fulfillment of the agreement must be sufficiently guaranteed; (iii) the representative organization that negotiated the settlement must sufficiently represent the collective; and (iv) the number of class members must be sufficient to warrant certification.[925] An important difference

921. Fierstra *et al.* 2009.
922. Meijer 2008, p. 137.
923. See Frenk 1994. See also Bloembergen 1996, p. 92; Stolker 1996, p. 130.
924. Ligteringen 2016, p. 166.
925. Fierstra *et al.* 2009.

from the concept set out in Article 3:305a of the DCC is that the figure of the WCAM applies to and binds anyone who can be considered a part of the collective unless the party opted out within the specified time. Another crucial difference is that a WCAM settlement may and does relate to damages.

The Amsterdam court of appeal considered itself to have jurisdiction in the *Converium* case to bind the parties to the settlement (between a defendant causing loss because of misleading information and multiple victims in Europe).[926] This was a remarkable case because neither the injurious party nor most of the victims came from the Netherlands. Most of the victims came from other Member States and Switzerland. Prior to the case, a settlement had been arranged in the United States between the defendant and the victims there. A district court in the United States did not consider it had jurisdiction over the natural persons outside the United States. Applying European legislation (i.e. Regulation on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Lugano Convention), which has also been endorsed by Switzerland and others, the Amsterdam court of appeal concluded that the Dutch courts had jurisdiction to order that a settlement was generally binding not only on Dutch citizens, but also on other victims in other countries that had endorsed the Treaties.[927] This case could very well also influence the attractiveness of the Netherlands as a choice of forum for victims of competition infringements. One result could be that victims from all over Europe could benefit from a single proceeding in the Netherlands.

Despite these special provisions it remains difficult for claimants with little loss to claim for damages.[928] It should be noted that the Dutch parliament is therefore currently considering proposals to amend the law so that it is possible to claim damages collectively under Article 3:305a of the DCC.[929] In July 2014, the Dutch government launched consultations on a bill for a new act called Redress of Mass Damages in a Collective Action Act.[930] Also, compensation for individual victims should be arranged in one way or another. From Europe as well there is pressure to introduce a system of collective actions, including the option of claiming compensation.[931] The Dutch government seems to comply with the wishes of the European Commission.

There is a third set of rules relating to organized (legal) persons that create a method of achieving some kind of "collective redress" via proxy, mandate and the cession of claims. For example, with regard to damages for infringements of competition law in the construction sector, a foundation (a type of legal entity) was formed. It was called "Foundation for Recourse and Recovery of Damages and Costs resulting from Construction Fraud" (*Stichting Regres en Verhaalschade en Kosten Bouw-*

926. Gerechtshof Amsterdam 12 November 2010 (*Converium et al.*); Gerechtshof Amsterdam 17 January 2012 (*Converium et al.*).
927. *Cf.* Poot 2006, pp. 169-202.
928. Braat & Rosenboom 2018, pp. 10-19.
929. See *inter alia* motion Dijksma, Netherlands, Parliamentary Papers II 2011/12. See also Meijer 2011, p. 327.
930. Netherlands Ministry of Economic Affairs 2014 (Public consultation on mass damages). See more info Braat & Rosenboom 2018, pp. 10-19.
931. European Commission 2013 (Recommendation on collective redress mechanisms).

fraude).[932] In the elevator cartel, a special foundation was established on behalf of housing corporations claiming damages from the elevator manufacturers.[933]

Pursuant to Article 3:83 of the DCC, rights of ownership, rights of limited property and obligatory claims are transferable, unless contrary to their nature or not allowed by law. There are companies specializing in private enforcement that purchase claims from victims of cartel infringers via assignment of the debt.[934] It is important to assign the claims in accordance with the requirements stated in Article 3:83 of the DCC and other provisions, otherwise the claimant could lose the case on formalities.[935] The advantage for the assignor is that it will be provided with a sum of money in case of success and will often not bear any of the financial and other risks of litigating.[936] If the claim turns out to be successful, some kind of success fee will often be paid by the claim vehicle. Furthermore, with the assignment of the debt, a dispute between the victim of the cartel and the infringer comes to an end for the victim. Less energy and financial investment on the part of the victim (assignor) is needed. The assignee will often be a specialist company that expects to receive more money from the litigation than it paid to the assignors. It is common for the assignee to provide the assignors with 70-80 percent of the collected damages and keep 20-30 percent for itself as a success fee. The advantage for the assignee is that it will receive the money upfront and will provide a percentage of the money to the assignors. In practice, it is common to commence joint actions, either by instructing and authorizing the same lawyer or some other person or legal entity.[937]

In a collective action based on Article 3:305a of the DCC, individual victims will retain their rights and the legal entity will act on its own behalf. A different situation exists where victims assign their claims to a claim collector. The assignment means that the claim collector receives the rights. The advantage of assigning claims to a special legal entity is that, unlike in an Article 3:305a proceeding, the legal person can claim damages directly. With an action based on Article 3:305a of the DCC, the individual victims still have to claim damages afterwards. As said, another advantage of assigning the claim is that the victim's risk is limited. The victim does not have to bear costs of proceedings, and the energy and efforts put in the proceedings by the victim will be more limited.

The negative side effect of introducing a claim funder/collector into the process might be that the claim funder/ collector has a clear interest of its own in going forward in the proceedings, to stop the proceedings or to settle a case. The interest of the victim of the competition law infringement is not the most relevant factor per se. In principle, by assigning a claim to a claim collector, a victim of a competition law infringement is dependent on the strategy of the claim collector and has lost its freedom to decide how to handle the case. Moreover, in most cases, the claim vehicle receives a part of the damages. In fact, it means that the victims of

932. Fierstra *et al.* 2009.
933. http://www.deglazenlift.nl.
934. E.g. www.carteldamageclaims.com, http://omnibridgeway.com, http://www.claimsfunding.eu/.
935. Hoge Raad 4 March 2005.
936. Zippro 2009, p. 505.
937. Fierstra *et al.* 2009.

the cartel are not fully compensated. In theory it could be argued that this is not in line with CJEU decisions and the Antitrust Damages Directive: the goal of full compensation for the victims of the cartel.[938]

Under Regulation No 2015/2421, victims of small claims can claim damages of up to EUR 5,000 rather easily.[939] As discussed in Section 4.2.3.2, it is also possible for different victims to combine claims. The European small-claims procedure only applies to cross-border cases. These are cases in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court where the action has been brought under this Regulation. It is not possible to claim damages if there is no cross-border element. Consumers and small and medium-sized enterprises often buy products from undertakings incorporated in the same Member State. It is likely that a cross-border element is not necessarily present. If not, proceedings under the Regulation are not possible. Moreover, the amount of EUR 5,000 is very limited.[940] It is likely that cartel victims, which often suffer the harm from continuous infringements for many years, will receive much higher damages. The practical relevance of this Regulation for cartel claims seems to be limited.

4.3.3.3 *Disclosure of Information*

As discussed in Section 2.5.3.5 there are several ways to obtain information related to a cartel. Via civil law provisions, a party could successfully request for information. Under Dutch civil law, litigants may use any and all means to prove their statements unless otherwise provided. The courts have discretion in their assessment of the evidence.[941]

There are several possible ways to receive information from the opposing party. Under Article 22 of the CCP, the parties are able to ask the court to order that information be provided by the opposing party. The court could (also on its own behalf) request a party to clarify something that is unclear or to provide the document(s). If the party has compelling reasons to do so, it may refuse to provide the information or document(s). The court has discretion to decide whether the refusal is justified. If the court is of the opinion that the refusal is unjustified, it can draw the conclusion that the court considers legitimate.

Pursuant to Article 186 of the CCP, it is possible to obtain evidence by hearing the testimony of witnesses before a judge in the pre-trial stage. This procedure can be used to determine whether sufficient evidence is available to substantiate the claim.[942] Requests for provisional examination of witnesses are, in principle, granted, except if these requests are used to go on a "fishing expedition" or when

938. *Cf.* CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*); Antitrust Damages Directive, Preamble point 44 et seq. and Article 3.
939. Regulation No 2015/2421 (Successor of Regulation No 861/2007).
940. *Cf.* Kramer 2014, p. 100.
941. Article 152 CCP.
942. Fierstra *et al.* 2009.

the applicant has not sufficiently indicated which facts need to be proved.[943] Dutch civil procedure also gives litigants the right to prove their arguments through witness testimony.[944] If a witness refuses to answer, the court may draw the conclusion it deems appropriate.

Pursuant to Article 202 of the CCP, it is possible to hear an expert in the pre-trial stage. If there are sufficient indications of an infringement, the request is relevant and sufficiently concrete and concerns facts that can be proved by the expert opinion, the request for a pre-trial provisional expert opinion will normally be granted.[945] According to Article 198(3) of the CCP, the parties are obliged to cooperate with the investigation of the expert. If a party does not cooperate, the court can draw the conclusions it deems advisable.

Pursuant to Article 150 of the Dutch CCP, the burden of proof is normally on the plaintiff. As a result of the application of the requirements of reasonableness and fairness, a shift in the burden of proof may follow. Hence, the requirements of reasonableness and fairness may, as an exception, require the defendant to refute the assertions raised by the plaintiff. This exception may only be applied in special circumstances.[946]

Pursuant to Article 843a of the CCP, a party may request access to documents needed to substantiate its claim. The Antitrust Damages Directive has ensured that an amended provision is now part of the Dutch legislation. This new arrangement will be discussed in Section 4.6.

For a successful request based on Article 843a, several requirements have to be fulfilled.[947] First of all, the applicant requires a legitimate interest in obtaining access to information. This condition is essentially fulfilled if a party enjoys an unreasonable advantage or the opposing party enjoys an unreasonable disadvantage because of the fact that certain evidence does not become part of the record.[948] Secondly, the documents must concern a legal relationship in which the applicant is involved. In 2010, the Amsterdam court of appeal decided that a legal relationship also exists in the event of a wrongful act.[949] The issue is significant for private enforcement, because a legal action based on a wrongful act is the most likely option to obtain damages. On 10 July 2015, the Dutch Supreme Court held that a legal relationship is no longer necessary to successfully request documents. According to the Supreme Court, the statutory amendments have resulted in both the other party and third parties possibly having to provide copies of documents.[950] As a third requirement, the requested documents must be specified as precisely as possible. In order to

943. Fierstra *et al.* 2009.
944. Article 163 CCP et seq.
945. Fierstra *et al.* 2009.
946. See e.g. Hoge Raad 9 September 2005.
947. Fierstra *et al.* 2009. See for more information Ekelmans 2010; Ekelmans 2007; Sijmonsma 2007.
948. Fierstra *et al.* 2009.
949. Gerechtshof Amsterdam 9 February 2010 (*DB Schenker Rail v ProRail*). See also Cornelissen *et al.* 2017, p. 250.
950. Hoge Raad 10 July 2015.

fulfill this criterion, the applicant should have knowledge of the existence and content of the documents requested.
Furthermore, as a fourth requirement, there is a requirement for the documents to be at the disposal of, or collocated with, the individual or legal entity to whom the request is addressed.

Under Article 843a (4) of the CCP, the requested access may be refused if this is justified by overriding reasons or if the fair administration of justice is served without granting access. According to Fierstra *et al.* refusal to grant access will not be easily granted on the grounds of overriding reasons.[951] Pursuant to Article 843b of the CCP, a claimant who has lost evidence may be given access to copies of the evidence.

The case of *CDC v Shell et al.* was interesting because the defendants, the cartel infringers, requested information from the claimants under Article 843a of the CCP.[952] They requested information regarding the claim assignments and the possible overcharge to their own purchasers.[953] The court considered Article 843a of the CCP to be a special disclosure provision. It served to require certain evidence to be provided in the legal proceedings. It reminded that in Dutch civil procedure there is no general disclosure provision requiring parties to provide all possible information and documentation. Taking that into account, and to prevent fishing expeditions, a successful request for disclosure under Article 843a of the CCP was subject to several conditions. First of all, the party requires an evidentiary interest in receiving the information. The information must be needed. Moreover, the requesting party should request "certain" documents that the other party has in its possession or is able to receive. Also, the party requesting information must have a legal relationship to the requested documents. A wrongful act is considered to create such a legal relationship. If all these conditions are fulfilled, a party is still not obliged to disclose the documents if there are weighty reasons for not doing so or if it can be assumed that even without the disclosure of the documents the proper administration of justice is guaranteed.[954] The court emphasized in *CDC v Shell et al.* that Article 843a of the CCP is not a general provision requiring parties to produce documents.[955] The court noted that it is also possible to disclose parts of documents if there is no legitimate interest in the requesting party having unlimited access to (copies of) the documents requested.[956] Interestingly, the court held that a requesting party did not have an interest in the disclosure of documents regarding the calculation of damages, as the determination of damages was not an issue in the main proceedings. The court concluded that the requesting party did not (or at least did not yet) have a legitimate interest in having access to (copies of) the documents.[957] In this case, the defendants also requested information regarding the purchases of the cartel victims. This was requested in order to assess whether or

951. Fierstra *et al.* 2009.
952. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*).
953. Kuijper & Leeflang 2015, p. 32.
954. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*), point 4.38.
955. Ibid, point 4.39.
956. Ibid, point 4.41.
957. Ibid, point 4.42.

not the damage was passed-on in the chain. The claimant had already made clear that it would provide the documents about the purchases. Although the court did not explicitly state that the claimants were obliged to disclose the information pursuant to Article 843a of the CCP, the court appears to agree that the claimant provides this information.[958] The case shows that Dutch courts are reluctant to allow fishing expeditions, but if a document is really needed for a civil action, disclosure is possible.[959]

Although Dutch civil procedure provides several instruments for fact-finding and collecting evidence, the methods of obtaining information are limited because of the relatively strict conditions under which information has to be disclosed. It remains difficult and a hurdle to receive the information and documents needed to prove a tortious act, the causal link and the amount of harm.[960] Particularly in standalone actions, obtaining the information needed to conduct litigation appears to be difficult. In fact, in follow-on cases press releases and decisions of the competition authority serve important assistance for the private enforcement action. This analysis matches Kortmann's observations. He reports that few claimants in private enforcement actions for damages feel the need to ask for discovery. He notes that virtually all the litigation consists of follow-on cases in which the claimants rely on the extensive description of the facts in the infringement decision of the competition authorities.[961]

4.3.3.4 *Passing-on Defense*

The basic principle in the Netherlands is that a party is entitled to be compensated for the actual harm.[962] The passing-on defense is legally admissible and can be used to deflect claims.[963] Damages claimed on the basis of an unlawful act will be unsuccessful if it cannot be established that the infringement caused damage to the claimant in the end.[964]

Some legal scholars are of the opinion that the passing-on defense is not reasonable as it makes it extremely difficult for plaintiffs to prove the harm suffered and the amount.[965] Only in special cases, like that of the elevator cartel, does it turn out to be relatively easy to show the loss suffered by the plaintiff. In the elevator-cartel situation, because the rents for social housing are fixed in the Netherlands, it is difficult to argue that the overcharge has been passed-on to the tenants (i.e. the housing corporations have not been able to pass-on the higher prices).[966]

958. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*), point 4.44.
959. See e.g. Gerechtshof Den Haag 18 December 2015 (*Milieudefensie et al. v Shell et al.*); Rechtbank Den Haag 21 September 2016 (*CDC v Total et al.*).
960. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*), point 4.44.
961. Kortmann 2014, p. 669. See also Kuijper & Leeflang 2015, pp. 32-33.
962. See also Ligteringen 2016, para 5.4.3.3.
963. *Cf.* Hoge Raad 8 July 2016 (*TenneT v ABB*), points 4.3.2 and 4.3.2. See also Fierstra *et al.* 2009.
964. Fierstra *et al.* 2009.
965. See e.g. Maton, Poopalasingam, Kuijper & Angerbauer 2011, p. 506; Van der Wiel 2009, pp. 724-731.
966. See for more information Stichting De Glazen Lift, http://www.deglazenlift.nl.

The case of *TenneT v ABB* makes clear that the passing-on defense may indeed be used in Dutch proceedings.[967]

The Arnhem-Leeuwarden court of appeal held in that case that the damage should be calculated from the time the harm suffered actually started. That does not mean, however, that later events should not be involved in the damages calculation. Referring to a case of the Supreme Court, the court of appeal held that circumstances of the case could result in later events being taken into account.[968] Reasonably, the amount claimable consists of the overcharge minus the damage the victim passed-on to its own purchasers, plus any lost profits and interest.[969]

The court of appeal reiterated that passing-on the damages results in shifting the damages to another party. As every harmed party has the right to get compensated, the indirect purchasers should also have this right. Although it is less likely that the indirect purchasers will claim damages for all the harm, and hence less likely that the cartel infringer will have to compensate for all the harm caused, that is not a ground for rejecting the passing-on defense, according to the court of appeal. Identifying all the overcharges caused by the cartel infringers is not the starting point of the damage assessment process, which is meant to compensate the claiming victim for the loss actually suffered.[970]

In a later decision of the Gelderland district court, this district court rejected the passing-on defense in a specific situation. Offsetting the benefits pursuant to Article 6:100 of the DCC was excluded, according to the court.[971] The court held that the injured person suffered harm but possibly also benefitted from the event. It concluded that any benefits did not have to be subtracted in this case because it would not be reasonable. The defendant (Alstom) did not argue which facts and circumstances made it reasonable to subtract the benefits the claimant (TenneT) received. Moreover, the court considered it very unlikely that the indirect purchasers would claim damages, as formal procedural difficulties and the very limited damages for the individual purchaser created hurdles that were such that it was unlikely that they would claim damages. Moreover, the court found that it was likely that TenneT would give the compensation it had received back to the end users, for example, via lower prices for electricity in the future.[972]

The Supreme Court made clear that the passing-on defense can be used by defendants. According to the Supreme Court it does not make much of a difference whether the basis is deducting the passing-on as deduction on the overall damage or by calculating the damage first and offsetting the benefits afterwards.[973] The

967. *Cf.* Hoge Raad 8 July 2016 (*TenneT v ABB*), points 4.3.2 and 4.3.2.
968. Hoge Raad 11 January 2013.
969. Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.32 et seq.
970. Ibid.
971. Rechtbank Gelderland 10 June 2015 (*TenneT v Alstom*), point 2.20 et seq.
972. Ibid.
973. Hoge Raad 8 July 2016 (*TenneT v ABB*), point 4.4.2.

Supreme Court accepts both ways and it is up to the court to decide which one it uses.[974]

A solution for plaintiffs seeking to circumvent the passing-on defense might be to avoid basing an action on Article 6:162 of the DCC in the first place, but instead to base the action on the principle of undue payment. The discussion should then focus merely on the recovery of the overpayment. However, this legal principle is primarily interesting to those claiming abuse of dominance. In cartel cases, this article appears to be less favorable as there is often not a contractual relationship with all or some of the infringers. Furthermore, in the literature several authors have concluded that the amount to be paid back (i.e. the undoing commitment) could be limited if allocating the payment were unjustifiably to enrich the claimant.[975]

Concerning the passing-on defense, another solution for plaintiffs might be the "illegal profit rule" as stated in Article 6:104 of the DCC, which provides that if someone liable towards another person on the basis of tort or failure to comply with an obligation has gained a profit because of this tort or non-performance, the court may, at the request of the injured person, estimate the harm in line with the amount of this profit or a part of it. Two decisions of the Supreme Court concerning Article 6:104 of the DCC could be interesting. In the case between Ymere (a housing corporation) and a tenant, the Supreme Court held that the tenant had to provide the housing corporation with the illegal profit made by the tenant (i.e. income from illegally renting the apartment minus the costs of conducting the illegal activity).[976] A similar decision was reached by the Supreme Court in a dispute between Setel N.V. and AVR Holding N.V.[977] In that case, AVR claimed compensation because Setel's tariff differentiation constituted a wrongful act. In violation of ministerial provisions concerning interconnection, Setel raised prices for phone calls made from its network to CT's network. The illegal profit had to be compensated. Although these cases did not concern competition law, it becomes clear that, for determining the damages, they could be relevant in determining what the profit of the wrongfully acting party has been. This is different than determining the actual loss of the injured party. Under Article 6:104 of the DCC, the court has a discretion to assess the damages. These cases may provide a solution for the discussion about the passing-on defense. Applying Article 6:104 of the DCC, a court may decide that the loss the victim of the cartel offence really suffered is irrelevant, and that only the advantage of the cartel offender is relevant.

By requesting the court to assess the damages on the basis of Article 6:104 of the DCC, it may be possible to avoid a discussion concerning the passing-on defense. It is important for the injured party making the request to the court to rely on Article 6:104 of the DCC. However, this solution could easily lead to overcompensation, so a defendant could defend itself by arguing that the plaintiff should not be

974. Hoge Raad 8 July 2016 (*TenneT v ABB*), point 4.4.5.
975. Hartkamp 2001, pp. 311-318 and 327-334. See also: Zippro 2009, Section 7.9.1.5; Van Leuken 2007, p. 1051.
976. Hoge Raad 18 June 2010 (*Huurster v Ymere*).
977. Hoge Raad 18 June 2010 (*Setel v AVR*).

overcompensated. The effect might well be that the court decides that the illegal profit rule with overcompensation of the claimant is not justified.[978] The defendant could possibly convince the court not to accept Article 6:104 of the DCC in determining the damages by demonstrating that such an outcome would be unfair. A court is not obliged to apply Article 6:104 of the DCC if it believes that the outcome would be unfair.[979] Moreover, it could also assign only a part of the profit as damages to prevent overcompensation.[980]

4.3.3.5 *Decisions of Competition Authorities*

Under Article 16 of Regulation No 1/2003, no national court may render a judgment inconsistent with a decision of the European Commission. If the European Commission concludes that there has been a certain cartel infringement, then a national court is not allowed to decide otherwise.[981] If a national court has doubts about the lawfulness of a decision of the European Commission, it can make a preliminary request to the CJEU.[982] According to the European Commission, the same is true for national competition authority decisions, which implies that a final decision of a national competition authority will be fully binding in every Member State, unless it violates the public order.[983] In practice, a decision by the ACM establishing an infringement of competition law will at least be an important indication to a civil court that an infringement has taken place.[984]

According to the Dutch Supreme Court, decisions of administrative authorities that can no longer be contested do have the force of law.[985] The doctrine of force of law precludes a separate assessment by a civil court of the lawfulness or unlawfulness of a decision if the lawfulness could have been submitted during the proceedings in the administrative court. A civil court will assume that the decision is substantively and formally lawful. There are several exemptions, including the following: (i) the lack of administrative legal protection; (ii) acknowledgment of wrongfulness by the administrative authority; and (iii) a violation of higher law or higher legal principles.[986] Looking at the case law, it is apparent that the Dutch civil courts are generally prone to following the ACM's practice.[987]

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978. See e.g. Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.27; Rechtbank Gelderland 10 June 2015 (*TenneT v Alstom*); Rechtbank Gelderland 24 September 2014, (*TenneT v Alstom*), point 4.10. See also Kuijper & Leeflang 2015, p. 31.
979. Parl. Gesch. Boek 6 (Inv. 3, 5 en 6), p. 1267. *Cf.* Parl. Gesch. Boek 6 (Inv. 3, 5 en 6), p. 1269.
980. See Hoge Raad 18 June 2010 (*Setel v AVR*), point 3.3.2; Hoge Raad 18 June 2010 (*Huurster v Ymere*), point 3.6. See also Asser/Sieburgh 6-II* 2017, nr. 105.
981. Meijer 2008, p. 134.
982. Ibid.
983. European Commission 2008 (White Paper on Damage Actions), pp. 5-6. See also Meijer 2008, p. 134.
984. Fierstra *et al.* 2009.
985. Hoge Raad 17 December 2010 (*ALL ROUND SHIPPING v Staat der Nederlanden*) and *inter alia* Hoge Raad 5 September 1997.
986. Scheltema 2009, pp. 20-25.
987. Fierstra *et al.* 2009, p. 8 mention: Rechtbank Haarlem 28 December 2004 (*N.A.L. v Cono Kaasmakers*); Gerechtshof Amsterdam 30 March 2006 (*KNB v Notaris*); Rechtbank Zwolle-Lelystad 1 November 2006 (*Vitelec v Micronic*); Rechtbank Haarlem 3 October 2006; Gerechtshof Leeuwarden 2 March 2005 (*Batavus v Verkoper*); Rechtbank Arnhem 25 November 2005; Rechtbank Utrecht 24 July 2009 (*Joint Port Staff Group v FNV*). *Cf.* Van Lierop & Pijnacker Hordijk 2007, pp. 31-32.

4.3.3.6 *Limitation Period*

Before the implementation of the Antitrust Damages Directive, according to the general limitation provision of Article 3:310 of the DCC, a five-year limitation period applies to actions for damages. The limitation period starts on the day after the victim has become aware of the damage and the party liable is known. According to the district court in Rotterdam, a victim that filed a complaint with the European Commission must be considered to be aware of the putative infringement for the purpose of the limitation period.[988]

If the limitation period has not expired, it can be interrupted by a written reminder or written notice sent by the creditor explicitly reserving its rights.[989] Recognition of the claim by the debtor also interrupts the running of the limitation period.[990] A new limitation period of five years begins on the day after the interruption.[991] In any case, the limitation period expires twenty years after the day the wrongful act was committed.[992] Finding out whether the limitation period has expired could be a hurdle. Cartel infringements often entail ongoing damage that can be hidden for a long time and will, in addition, be difficult to prove.[993] The 2007 Rotterdam district court case makes clear that due consideration should be given to the limitation period. In that particular case, the court held that plaintiffs were too late with their claims and therefore the plaintiffs had no cause of action.[994] Briefly stated, the court held that, pursuant to Article 3:310 of the DCC, a time limitation for an action for damages expires five years after the day on which the injured person becomes familiar with (i) the damage and (ii) the person responsible for the damage. In this specific case, the plaintiff (CEF) was too late. The court assumed that the company had not breached Article 101 of the TFEU after 1994. CEF informed the defendants of their liability for the first time in a letter dated 19 May 2000. CEF denied that it was aware of the damage before 1995, but it did not sufficiently substantiate this point of view, according to the court. In 1991, CEF had already submitted a complaint to the European Commission concerning the alleged infringement and in 1991 CEF was already familiar with a letter from the European Commission that its allegations generally appeared to be well founded. The court considered that CEF was already familiar with the damage and the persons involved before 19 May 1995, and therefore CEF's claim was time barred.

In its decision, the court explicitly stated that the requirement was not that CEF be aware of the exact extent of the damage. Nor was there requirement that CEF knew that the abusive nature of the actions of the company had already been decided by the European Commission.[995] The result of the decision is that a victim that has complained to the competition authority is not able to defend itself against

988. Rechtbank Rotterdam 7 March 2007 (*CEF CITY Electrical factors B.V.*).
989. Article 3:317 DCC.
990. Article 3:318 DCC. See also: Fierstra *et al.* 2009.
991. Article 3:319 DCC.
992. Article 3:310 (1). Fierstra *et al.* 2009.
993. Meijer 2008, pp. 135-136.
994. Rechtbank Rotterdam 7 March 2007 (*CEF CITY Electrical factors B.V.*)
995. Ibid.

failing to meet the limitation period with the argument that it was not yet aware of the exact damages. Nor can it argue that the competition authority had not yet made a decision.

In the case of *TenneT v ABB*, the Eastern Netherlands Court also considered whether a limitation period had expired and whether the claims of the claimants should be rejected. The cartel infringer (ABB) argued that the limitation period started on 13 May 2004, at the time the European Commission published the press release in which it mentioned the investigations regarding the swift gear cartel and ABB published a press release on its website. TenneT formally held ABB liable on 24 June 2010. The court rejected ABB's defense.[996] First of all, ABB did not prove that TenneT was aware of the existence of the press releases. Moreover, the press releases only announced an investigation. According to the court, the announcement of an investigation does not imply that the claimants knew, or should have known, that they had been the victims of a cartel infringement and had suffered harm. Nor does it imply that the claimants should have started an very thorough investigation.[997]

On appeal, the Arnhem-Leeuwarden court of appeal provided even more guidance regarding the limitation period. Referring to a decision of the Supreme Court, the court of appeal held that the five-year limitation period starts to run the day after the victim is able to start a legal action for damages, which is the time the victim obtained sufficient certainty (not absolute certainty) that the damage was caused by the inadequate conduct or wrongdoing of the involved parties.[998] The court of appeal considered that in this specific case, the limitation period did not start to run prior to the decision of the European Commission of 24 January 2007.[999] The five-year limitation period was interrupted on 24 October 2010, which meant that the claims were not time-barred.[1000]

4.3.3.7 *Masterfoods Defense*

One of the difficulties that has arisen in Dutch courtrooms relates to the "Masterfoods defense". Several defendants argued that civil damages proceedings should be stayed pending the outcome of the appeals before the EU courts against the relevant decision of the European Commission.[1001]

The Amsterdam district court in 2013 decided that a civil damages claim against several airlines following the air cargo decision of the European Commission should be stayed awaiting the outcome of the appeals by the airlines against the air cargo decision of the European Commission.[1002] The court's decision was based on the

996. Rechtbank Oost-Nederland 16 January 2013 (*TenneT v ABB*), point 4.22 et seq.
997. Ibid, point 4.24; Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.19 et seq. See also Braat 2013, pp. 320 and 324.
998. Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.20; Hoge Raad 9 October 2009 (*Gemeente Stadskanaal v Deloitte & Touche*).
999. Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*TenneT v ABB*), point 3.21.
1000. Ibid.
1001. Kuijpers *et al.* 2015, p. 2.
1002. Rechtbank Amsterdam 7 March 2013 (*Equilib v KLM c.s.*).

case of *Masterfoods v HB Ice Cream*, codified in Article 16 of Regulation No 1/2003.[1003] On appeal, the Amsterdam court of appeal decided that if a party is relying on a decision of the European Commission and is requesting to stay the proceedings, it is required to demonstrate the following: (i) the party appealed the decision of the European Commission in a timely manner; (ii) it has substantiated that its opposition to the decision of the European Commission is reasonable; and (iii) it has specified which defenses it wishes to raise before the European courts to challenge the decision of the European Commission. This should enable the national courts to assess whether the defense indeed depends on the validity of the decision of the European Commission.[1004] According to the Amsterdam court of appeal, the airlines had not sufficiently substantiated their request to stay the civil proceedings. Therefore, the court of appeal annulled the decision of the district court.[1005] The case was referred back to the district court to be further litigated between the parties and for a new decision as to whether and to what extent the civil damages proceeding should be stayed.[1006] The Amsterdam court of appeal requires the defendants to substantiate the defense and specify which defenses it is raising before the European courts to challenge the decision of the European Commission. This should be sufficient to enable the national court to assess whether the defenses in the civil proceedings relate to the decision of the European Commission.

In the wax cartel case, the Hague district court decided somewhat differently. The district court noted that it was not allowed to take any decision that contravened a decision of the European Commission. The court held that the obligation under EU law to cooperate means that the court should stay the proceedings if the decision were contrary to the decision of the European Commission.[1007] The court held that at that stage of the proceeding — the defendants had yet to provide the statement of defense so the court had not yet taken judicial notice of the decision of the European Commission taking all factors into account — the court considered that it would not (yet) take a decision that contravened the decision of the European Commission. It made clear that it is likely that decisions also had to be taken by the court that did not relate to the decision of the European Commission and that are not expected to create a danger of contradicting a decision of the European Commission. One can think of formal discussions like the validity of the assignment, the applicable law and joint and several liability.[1008] The court held that the resolution of the dispute between the parties does not entirely depend on the validity of the decision of the CJEU. Because of this, the court concluded that there was no reason to stay the proceedings.[1009] Staying the proceedings just because the decision of the European Commission is being appealed would be contrary to the principle

1003. CJEU 14 December 2000 (*Masterfoods v HB Ice Cream*).
1004. Gerechtshof Amsterdam 24 September 2013 (*Equilib v KLM et al.*). See also Kuijpers *et al.* 2015, p. 4.
1005. Gerechtshof Amsterdam 24 September 2013 (*Equilib v KLM et al.*). See also Gerechtshof Amsterdam 7 January 2014 (*EWD v KLM et al.*); Gerechtshof Amsterdam 4 February 2014 (*KLM et al. v Lufthansa et al.*).
1006. Kuijpers *et al.* 2015, p. 4.
1007. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*), point 4.25.
1008. Ibid, point 4.26.
1009. Ibid, point 4.27. See also Rechtbank Gelderland 26 October 2011 (*TenneT v Alstom*), point 4.11; Rechtbank Rotterdam 9 February 2011 (*MNO Vervat v Shell*), point 3.6.

of effectiveness, as mentioned in the case of Courage v Crehan.[1010] The court makes clear that at a later stage, it is possible that it will stay the proceedings.[1011]

It appears that the different courts do not exactly have the same approach to the Masterfoods defense. The Amsterdam court of appeal assesses the substances of the appeal against the decision of the European Union, but this additional test appears not to be part of the other courts' assessment.

4.3.4 Conclusions

Most of the cartel private enforcement actions for damages, if not all, are follow-on cases, also in the Netherlands. It has become clear that in almost all cases the cartels were detected and their existence proven because one or more of the cartel infringers applied for leniency.

In the last couple of years, the Netherlands has become one of the most favorite countries in which to claim damages for competition law infringements. This was not due to the introduction of a special private enforcement regime in the Netherlands, but is attributable to a number of factors: an effective judiciary, the low cost of litigation, the possibility of assigning claims and bundling claims,[1012] the possibility of estimating damages, and the active involvement of legal practitioners and claim vehicles that entered and embraced the market enthusiastically after *Courage v Crehan* and the publication of the Green Paper and the White Paper.

Where Dutch statute law left room for discussions about the interpretation of some specific private enforcement elements, the case law brought clarity to a large extent. Especially the cases of *TenneT v ABB* and *TenneT v Alstom* have answered several legal questions and have been of enormous value to private enforcement in the Netherlands. The courts have made a number of points clear: how damages must be calculated; if and how the passing-on defense should apply; which entities within a group can be held liable on the basis of a decision of a competition authority; the role of the Masterfoods defense and the limitation period.

There were also still some elements of the Dutch private enforcement system that could be improved to make it easier for claimants to claim damages.

First of all, it remained a hurdle (and it is often apparently impossible) for claimants to obtain information regarding competition law infringements from other parties. As seen, this is of particular importance for standalone actions as more than a suspicion and some kind of proof must exist to successfully request information. Especially in standalone cases, it is difficult for claimants to collect evidence for a strong case and this potentially prevents victims from starting proceedings. According to the available case law, the decisions of the competition authorities prove to be very important. With that information, the existence of the cartel is disclosed

1010. Rechtbank Den Haag 1 May 2013 (*CDC v Shell et al.*), point 4.27.
1011. Ibid, point 4.28.
1012. Kortmann 2014, p. 662.

and information becomes available. For follow-on cases, the disclosure of additional information appears less relevant.

Second, the limitation period of five years is independent of the administrative process. Awaiting the final outcome of the public process without starting proceedings or at least without interrupting the limitation period appears dangerous. It created an incentive for defendants to delay the proceedings. Possibly other victims of the cartel would not be able to claim damages because of the expiration of the limitation period.

Third, it remains difficult to claim damages on behalf of a group. If the damage is small, victims are often reluctant to claim damages because the cost of litigation is too high in relation to the potential compensation.[1013] Without a system of collective redress, it is likely that these victims in particular will remain uncompensated and the competition law infringers will remain unduly enriched. Concerning the Masterfoods defense, it appears that the Amsterdam courts have a different approach than the other courts in the Netherlands. They also take a substantive look at the grounds of appeal against the decision of the competition authority. A unified approach by the courts would be preferable.

Concerning the position of the leniency applicant in Dutch civil proceedings, the following can be concluded. As said, public enforcement cartel cases are almost always uncovered by the leniency applicant(s). The public enforcement case appears in almost every case as the start of the civil proceedings. Hence, private enforcement cartel cases are standard so-called 'follow-on' cases. It means that the application for leniency could very well lead to antitrust damages claims in the Netherlands and these damage claims could be substantial, also for the leniency applicants. Especially under the regime prior to the implementation of the Antitrust Damages Directive, all infringers were jointly and severally liable for the cartel damage, including the immunity recipient. In fact, the leniency applicant had been a particularly interesting party to sue because of its joint and several liability towards the victims and because it already confessed its participation in the cartel to the competition authority. Moreover, special other characteristics made the leniency applicant an even more useful first target for claimants. The Masterfoods defense could have had a negative effect. The leniency applicant often does not appeal the decision and will therefore have a final and irrevocable decision of the competition authority prior to the infringers that do appeal the decision. It potentially had the effect that claimants focus on the leniency applicants from which the decision is final and irrevocable. They are able to claim for the complete damage and do not have to await to complete administrative procedure first.

4.4 Comparison and Analysis of Private Enforcement in Germany and the Netherlands Prior to the Antitrust Damages Directive

German lawmakers anticipated the introduction of the directive of the European Commission. They modified Article 33 of the ARC, including elements also men-

1013. Braat & Rosenboom 2018, pp. 10-19.

tioned in the European case law and by the European Commission in the Green Paper and White Paper already prior to the acceptance of the Antitrust Damages Directive. The adjusted provision appeared to be pretty successful. After the changes in 2005, the number of civil claims has increased substantially. If the signs are not misleading, this is a good portent for other Member States where a rather similar regime will apply because of the introduction of the Antitrust Damages Directive.

In the amended Article 33 of the ARC (amendments of 2005 and 2013), German private enforcement provides a framework that assists claimants. In line with the Green Paper, the White Paper and the Antitrust Damages Directive, German courts are bound to honor the decisions made by cartel authorities regarding cartel infringements, claims can be brought to court by private associations, and there is a special suspension term/limitation period incorporated into Article 33 of the ARC for filing a claim after the competition authority's decision becomes final.

In the Netherlands until 2017, there were no special amendments for an upcoming private enforcement. The Dutch system of private enforcement seemed to be less developed than the German variant. However, because cartel victims started proceedings in the Netherlands, court decisions have created a private enforcement framework.

In Germany, there was a special limitation period for private enforcement claims already. The provision provided for a term that expires after the decision by the cartel authority has become final. Such a provision was missing in the Netherlands. Moreover, although it could be argued that the Dutch civil courts followed the final decision of the national competition authority, the irreversible decisions of the national cartel authorities concerning cartel infringements were not considered irrefutable evidence for the civil courts. In Germany, they already were.

A possible difficulty in Germany was that it remained fairly difficult for cartel victims to receive documents and information from the cartel infringers or cartel authorities. Although there appear to be more ways to receive information from other parties under Dutch law than under German law, it has to be concluded that even in the Netherlands it remained difficult to receive relevant information unless at least some information is already available to give the impression that the infringement factually took place, especially where it concerns so-called standalone cases.

Additionally, the German and Dutch systems did (and still do) not provide sufficient opportunities to claim damages on behalf of a group. With regard to collective redress, the German system appears not to be completely in line with the thoughts of the European Commission. There remains little incentive for associations to start legal proceedings. In the Netherlands there are more possibilities for collective redress and collective settlements. Moreover, Dutch lawmakers are working on amended collective redress legislation in which it will also be possible to claim collectively for redress. In 2014, the Dutch Minister of Security and Justice started

consultations on a draft bill for collective damages actions.[1014] For victims with only limited damage, this may open doors to recover damages. In Germany, such developments have not yet been encountered.

4.5 A Quick Overview of Private Enforcement in Other Member States

The fact that Germany and the Netherlands are discussed so extensively does not mean that no private enforcement actions and developments related to private enforcement took place in the other Member States. For the sake of completeness, the situation and developments in other Member States will be described briefly in this Section.

In 2013, the Commission concluded that the 52 actions for damages were brought in only seven Member States. In the other Member States, the European Commission was not aware of any follow-on action for damages based on a European Commission decision. Among those seven Member States, as described, the vast majority was brought in the United Kingdom, Germany and the Netherlands.[1015]

The European Commission noted that the relative preference for a legal system in order to bring an action, or the relatively higher likelihood of victims of competition law infringements to claim compensation in the United Kingdom, Germany and the Netherlands depends merely on more effective procedural rules for antitrust damages actions.[1016] The European Commission concludes that the differences between the Member States lead to inequalities and uncertainty concerning the conditions under which injured parties can exercise the right to compensation deriving from the Treaty and may affect the substantive effectiveness of this right.[1017] As injured parties often choose the forum of their Member State to claim damages, the discrepancies between the rules of the different Member States risk leading to an uneven playing field as regards actions for damages and may affect competition on the markets on which these injured parties operate.[1018] Similarly, these differences in applicable rules mean that undertakings established and operating in different Member States are exposed to significantly different risks of being held liable for infringements of competition law.[1019] According to the European Commission, this uneven enforcement of the EU right to compensation may result in a competitive advantage for some competition law infringers, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced.[1020] As such, the differences in the liability regimes applicable in the Member States may negatively affect competition and risk to the extent of appreciably distorting the proper functioning of the internal market.[1021]

1014. Netherlands Ministry of Economic Affairs 2014 (Public consultation on mass damages).
1015. Stancke 2017, p. 4.
1016. European Commission 2013 (Impact Assessment for Directive proposal), point 52.
1017. Ibid, point 53.
1018. Ibid.
1019. Ibid, point 54.
1020. Ibid.
1021. Ibid.

One of the aims of the European Commission in introducing the Antitrust Damages Directive, is that the differences between the regimes in the several Member States will be reduced so that a level playing field and proper functioning of the internal market can be achieved. Claimants should be able to claim for damages in all Member States, as occurs in the United Kingdom, Germany and the Netherlands to a certain extent already.

In line with the observations of the European Commission, several annual comparative competition guides show that the developments in damages procedures as part of private enforcement of competition law have been moving slowly in most other Member States.[1022] If private enforcement of competition law takes place at all, it often relates to actions for nullity of contracts and not to actions for damages.

The amount of antitrust damages cases is limited in the other Member States, even though some of them introduced special private enforcement legislation to make it easier to claim for damages. Besides Germany, other Member States such as Romania and Hungary introduced a special antitrust damages actions regime. The new rules in Hungary could be considered remarkably progressive.

In 2009, the Hungarian legislator amended its Prohibition and Restrictive Market Practices ("HCA") by introducing the rebuttable presumption that a hard-core cartel causes a ten percent price increase in the market.[1023] Such a rule makes it easier to claim for damages because an overcharge is not to be proven. It is up to the infringers to prove that there is no overcharge or that the overcharge is less than ten percent. It can also easily result in overcompensation. The second reform aims at protecting the first leniency applicant. According to Article 88.D of the (former) HCA, the successful immunity applicant can be sued for damages only if the plaintiff has not succeeded in obtaining full compensation from the other defendants.[1024] It meant that the leniency applicant with immunity was protected against damages claims to a large extent.[1025] Only if compensation could not be received from the other infringers the leniency applicant with immunity was obliged to compensate the claimants. Despite these amendments, private actions remained scarce in Hungary.[1026] As the rules deviate from the Antitrust Damages Directive, and the Hungarian legislation should be in line with the provisions of the Antitrust Damages Directive, the system had to be adjusted.

The United Kingdom (more specifically England and Wales) is a popular jurisdiction for bringing private antitrust actions.[1027] The reputation of English courts, specializing judges, innovative funding arrangements and an extensive disclosure regime

1022. See *inter alia The Antitrust Law Review 2013*, Global Competition Review, Law Business Research Ltd; *Private Enforcement 2012*, Global Competition Review, Law Business Research Ltd; *The International Comparative Legal Guide to: Competition Litigation 2012*, Global Legal Group Ltd.
1023. OECD 2015, p. 10.
1024. Ibid.
1025. Buccirossi, Marvão & Spagnolo 2015, pp. 4-5.
1026. OECD 2015, p. 10.
1027. Scott *et al.* 2017, p. 109.

make claimants choose this jurisdiction.[1028] Moreover, the high legal costs of proceedings and the special procedure offered in Part 36 as stated in the Civil Procedure Rules appear interesting for claimants.[1029] Both motivate defendants to settle the dispute. Under the 'Part 36' regime in the Civil Procedure Rules, a claimant may make an offer to settle at any stage in the proceedings. If the offer is not accepted by the defendant and at trial the claimant obtains a judgment "more advantageous" than its offer, the court may, on being informed of the offer and at its discretion, award: (i) interest on damages and on costs at up to 10 percent above base and (ii) may also award costs to be assessed upon the indemnity basis, which means that all of the claimant's legal costs and disbursements are recoverable except those the defendant is able to show were incurred unreasonably. A defendant may also make a Part 36 offer. If the claimant were to reject it and then win at trial but not obtain a judgment more advantageous than the defendant's offer, the court can order the claimant to pay the legal costs of the defendant.

4.6 Private Enforcement in Germany and the Netherlands and the introduction of the Antitrust Damages Directive

4.6.1 Introduction

By the end of 2016 the Antitrust Damages Directive had to be implemented in the national legislation of the Member States. Almost none of the Member States implemented the Antitrust Damages Directive in time. By the end of May 2017, 12 of the Member States had still not yet implemented the Antitrust Damages Directive. This included Germany. However, from June 2017 the Antitrust Damages Directive provisions became part of the German competition law.

The most important changes stemming from the Antitrust Damages Directive in Germany and the Netherlands will be discussed as far as they are related to the topic of this study. The author does not describe every single change, as most of the changes are a copy of the provisions as stated in the Antitrust Damages Directive as described in Section 3.3.2. Regarding certain provisions, for example concerning the limitation period and the disclosure of information, there is some room left for the Member States to further elaborate or expand the set of rules of the Antitrust Damages Directive. In Section 4.6.2 the specific choices in the German system will be summarized. In Section 4.6.3 the specific choices in the Dutch system will be summarized.

4.6.2 Changes in Germany

Some drafts of a completely new ARC (ninth GWB) have been produced and published since the second half of 2016. Since June 2017, the Antitrust Damages Directive provisions have been part of German legislation. It includes much more than only the implementation of the Antitrust Damages Directive. The changes of

1028. Israel, Dimopoulos & Walton 2013, p. 181.
1029. Scott *et al.* 2017, p. 141.

the ARC also relate to the adjustments because of digitalization concerns in relation to competition and provide adjusted rules for concentrations.[1030]

Regarding the implementation of the Antitrust Damages Directive, the German federal government changed Section 33 ARC drastically and incorporated the new sections 33a (duty to pay compensation), 33b (binding effect of competition authorities), 33c (passing-on), 33d (joint and several liability), 33e (Immunity recipient), 33f (settlement), 33g (means of evidence) and 33h (limitation period).

Not all provisions will be discussed in detail, as most of the provisions mirror what is stated in the Antitrust Damages Directive. However, there are several provisions that are in line with the Antitrust Damages Directive, but do include the independence choice of the German federal government as well. The ones relevant for this study will be discussed below.

One of the most important findings is that the Section 33 ARC and further not only apply if there is an interstate effect, but also if it is a pure domestic competition law infringement (i.e. even if there is no interstate effect). This is not required by the Antitrust Damages Directive.[1031]

Section 33b ARC provides that final decisions of competition authorities and final decisions of courts after decisions of competition authorities, are binding for the court in a private damage action. It also implies that decisions coming from other Member States are binding. Also this is not required by the Antitrust Damages Directive.

Regarding the means of the disclosure provision, the German Federal Government did not implement rules that are, although allowed, broader than the minimum requirement on disclosure as required by the Antitrust Damages Directive.[1032] It should be noted that for Germany, the adjustments are already a huge step.[1033] In Germany, the adaptation of the disclosure regime is even described as the core point of the ninth ARC Novella.[1034] In literature there is quite some criticism about the German disclosure provision. Legal authors note that there is still a great deal of uncertainty about this new provision.[1035] The exact meaning of a lot of terminology is unclear.[1036] Moreover, it is questioned whether leniency documents that are protected under the Antitrust Damages Directive from disclosure, are in each and every situation protected from disclosure *per se*. There might be situations in which the case-by-case analysis — as stated in the *Pfleiderer* case and the *Donau Chemie* case — make it necessary to disclose leniency documents.[1037]

1030. German Federal Government 2016, p. 1.
1031. See *inter alia* Antitrust Damages Directive, preamble point 10.
1032. Antitrust Damages Directive, Article 5(8).
1033. Schroeder, Polley, Harms *et al.* 2017, pp. 2, 3 and 5.
1034. See *inter alia* Ruster 2017, p. 158.
1035. Ibid.
1036. Ibid.
1037. Ibid, p. 167.

The German Federal Government did introduce a new limitation period of five years for antitrust damages claims in Section 33h ARC. The five-year period starts at the end of the year in which the claim arose, the victim knew or should have known about the existence of competition law infringement and the identity of the infringers, and the infringements ended.
The limitation period also ends irrespective of whether the victim knew or should have known about the existence of competition law infringement 10 years after the claim arose and the infringement has ended. Furthermore, as a third limitation period, the limitation period also ends 30 years after the infringement caused damages. Limitation periods are suspended during the public enforcement proceedings of the BkartA, European Commission or another competition authority within the EU. The suspension ends one year after the final decision or other end of the public proceedings. For the victims who are not considered as direct or indirect purchasers and providers of the immunity recipient, the five-year limitation period against the immunity recipient starts from the end of the year in which it becomes clear that full compensation cannot be received from the other infringers. For those victims, in this circumstance, the 10-year imitation period is not applicable. It implies that there is no need to claim damages from the leniency applicant in advance to secure the (potential) claim (Section 33h (8) ARC).

In Germany, Section 33e ARC makes clear that the immunity recipient is only obliged to pay damages to its direct and indirect purchasers or providers. For other victims of the cartel, the immunity recipient is only obliged to pay the damages as far as they cannot be claimed from the other infringers. Section 33e ARC makes clear that the immunity recipient cannot be held liable for claims that are already prescribed in relation to the other infringers. If a claim for damages against the other infringers is no longer enforceable because of the expiry of the limitation period, the liability of the immunity recipient is also excluded from this claim. Section 33h (8) ARC under 1 makes sure that for victims that cannot be considered as the direct and indirect purchasers or providers of the immunity recipient, the limitation period starts by the end of the year in which becomes clear that they cannot receive compensation from the other infringers. The advantage of this specific provision is that for this group of victims there is no need to file suit against the immunity recipient rapidly, without knowing whether other infringers will compensate the damage just in order to prevent that claims could be time-barred.[1038]
It also means another advantage for the leniency applicant, as it could be expected that the immunity recipient will not be one of the most interesting parties to sue first. The disadvantage is that it is in uncertainty for a long time about whether claims should still be expected.

4.6.3 Changes in the Netherlands

The Dutch legislator implemented the Antirust Damages Directive at the beginning of 2017. It is common in the Netherlands that an act implementing a Directive contains no provisions that go beyond the provisions of a Directive.[1039] It implies

1038. Schuler & Stübinger 2017, p. 353.
1039. Netherlands, Parliamentary Papers II 2015/16, p. 2.

that these adjustments are not applicable for pure domestic competition law infringements.[1040] The Dutch legislator provided a separate new bill in which the pure domestic infringements are covered by the same regime.[1041]

The new law contains rules that protect certain categories of information. Other information may be ordered by the court. Like the German legislature, the Dutch legislature does not provide a broader system for the disclosure of information, but limits the provision to what is strictly necessary on the basis of the provisions of the Antitrust Damages Directive.

The national disclosure provisions had to be adjusted to be in conformity with the Antitrust Damages Directive. A new Article 844 CCP provides a special disclosure regime in relation to competition law infringement claims. The provision is similar to the already existing 843a CCP provision. Under Section 843a CCP, no successful request can be made to the right of access if it can reasonably be assumed that a proper administration of justice can also be obtained without the requested for information. Such a condition is not included in the Antitrust Damages Directive. Pursuant to Article 845 CCP, this condition is removed for claims based on a competition law infringement as referred to in Article 193k DCC. On the basis of article 846 CCP, leniency statements and settlement statements are protected against disclosure. Leniency statements may not be used by the court as evidence. It is questioned whether leniency documents that are protected under the Antitrust Damages Directive from disclosure, are in each and every situation protected from disclosure *per se*. There might be situations in which the case-by-case analysis — as stated in the *Pfleiderer* case and the *Donau Chemie* case — make it necessary to disclose leniency documents.[1042]

The Dutch court is bound by the final and irrevocable decision of the ACM (Article 161a Dutch CCP). However, unlike in Germany, the Dutch legislator decided that the Dutch court is not bound by a final decision of a competition authority or court of another Member State per se. The decision of the competition authority or court of another Member State may be used as *prima facie* evidence, however.[1043]

The Dutch legislator introduced a new special limitation period regime for cartel damages claims in article 6:193s and 6:193t of the DCC. The limitation period is five years. The limitation period does not begin to run until the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behavior and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer. The five-year limitation period will be prolonged if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end, at the earliest, one year after the infringement decision has become final or after the proceedings are

1040. See *inter alia* Antitrust Damages Directive, preamble point 10.
1041. Netherlands, Parliamentary Papers II 2015/16, p. 2.
1042. Ruster 2017, p. 167.
1043. Netherlands, Parliamentary Papers II 2015/16, p. 8.

otherwise terminated. Originally the legislator planned to interrupt the limitation period, which could lead to a longer prescription period. Under the guidance of Kortmann *et al.* the legislator changed the extension from an interruption (common in the Netherlands) during the legislation process into a suspension of the period.[1044] The rationale was that the interruption period could create more uncertainty for cartelists because of an extremely long limitation period, resulting in less willingness to settle a dispute with the victims because as long as claims are not prescribed, the risk lingers that other potential claimants instigate claims. The Dutch legislator also implemented a 20-year absolute limitation period. According to Article 6:193t DCC, the absolute period starts to run the day after the infringement ends.

4.7 Conclusions

Within Europe, the United Kingdom, Germany and the Netherlands are the leading nations for private enforcement litigation. It appears that for these three countries, this new Antitrust Damages Directive was not necessary to ensure that victims are compensated for their harm.

Germany seemed to be a precursor when it came to competition law in Europe.[1045] Germany is an interesting forum for a number of reasons. Claim collectors are able to purchase claims. Germany is known for its effective judiciary and relatively low cost. In terms of the German legislation, Germany even had quite a unique position because it had implemented special private enforcement legislation prior to the introduction of the Antitrust Damages Directive. The specific legislation codified the European case law; and it was more or less in line with the Green Paper and the White Paper of the European Commission. The German legislator made it easier to claim damages and provided certainty for claimants in claiming for damages.

The Netherlands also has an attractive climate to claim damages. In the Netherlands as well, claim collectors/ funders are able to purchase claims from victims. The Netherlands is also renowned for its effective judiciary and relatively low legal costs.

The difference compared to Germany is that — at least until very recently — claimants in the Netherlands based their claims on standard provisions. Because of this, specific aspects concerning private enforcement — limitation periods, standards of proof regarding competition authority's decisions etc. — were not subject to specific legislation, and questions in that context had to be dealt with by the courts. This has created uncertainties for claimants and concurring/dissenting rulings, certainly in the first few years since private damages actions became more common.[1046]

In both national systems, prior to the Antitrust Damages Directive, the immunity recipient could be held liable and was jointly and severally liable for the entire

1044. Kortmann *et al.* 2015, pp. 6-8.
1045. See Section 1.3.
1046. For example about applying the limitation period provisions, the Masterfoods defense doctrine and the passing-on defense.

damage. In fact, in both countries, the immunity recipient potentially encountered several negative effects of applying for leniency in the civil procedure. First of all, the leniency applicant admitted its role in the cartel to the competition authority. Moreover, there was uncertainty about information that potentially had to be disclosed and could be used in follow-on actions. Moreover, leniency applicants (especially immunity recipients), were interesting to target for damages claims, as the decision of the competition authority could have been, and often was, final and irrevocable at an earlier stage then the decisions of the other defendants that often appealed the decision of the competition authority.

The adoption of the Antitrust Damages Directive has meant statutory amendments in German legislation and created statutory amendments in the Dutch legislation as well. The amendments mainly relate to the disclosure of evidence, burden of proof, the stronger position of indirect claimants, and the adjustment of the limitation period.

Regarding the relation between the leniency policy and private enforcement, with the arrival of the Antitrust Damages Directive some important elements changed. Leniency statements are protected from disclosure and also other information will be protected during the competition authority's investigation. Other information, also from the immunity recipient, could be disclosed. In literature, it is questioned whether leniency documents that are protected under the Antitrust Damages Directive, including the corporate statement, are in each and every situation protected from disclosure *per se*. There might be situations in which the case-by-case analysis — as stated in the *Pfleiderer* case and the *Donau Chemie* case — make it necessary to disclose leniency documents.[1047] Where clarity and preventing uncertainty was one of the goals, there could be still some uncertainty about the disclosure of leniency documents. Most likely, the CJEU will have to turn to this question one day.[1048]

The joint and severally liability is partly removed from the immunity recipient. It makes the immunity recipient a less interesting target for claimants. In principle the immunity recipient is relieved from joint and several liability for the entire harm and any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. The immunity recipient remains fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

The limitation period of the leniency applicant, e.g. the immunity recipient, could end prior to those of the other infringers, if it does not appeal the decision. It could have the effect that victims are already claiming from the leniency applicant, pre-

1047. Ruster 2017, p. 167.
1048. Ibid.

venting claims being time-barred. The German legislator provides some kind of solution for the indirect purchasers and providers. Section 33h (8) ARC under 1 provides a special limitation period for victims that can not be considered as the direct and indirect purchasers or providers of the immunity recipient. The limitation period starts by the end of the year in which becomes clear that they can not receive compensation from the other infringers. The advantage of this specific provision is that for this group of victims there is no need to file suit against the immunity recipient rapidly, without knowing whether other infringers will compensate the damage just in order to prevent that claims could be time-barred. It also means another advantage for the leniency applicant, as it could be expected that the immunity recipient will not be one of the most interesting parties to sue first. The disadvantage is that there could exist uncertainty for a long time about whether claims should still be expected.

For both countries, the remaining obstacles to improving the situation for claimants relate to difficulties in collecting information, especially in stand-alone cases and a lack of collective redress possibilities.

Chapter 5 will give an overview of the characteristics of US private enforcement. In Chapter 6 the amendments to the national legislation as a result of the adoption of the Antitrust Damages Directive will be further discussed, bottlenecks will be summarized and additional suggestions for legal system(s) will be made to make overall competition law enforcement even more effective.

Chapter 5

The System in the United States

5.1 Introduction

The United States has a long history when it comes to antitrust legislation. It was the first country in the world to have antitrust legislation and a leniency programme. Furthermore, there is no country in the world with more private enforcement than the United States.

In this chapter, the legal framework of antitrust legislation and the development of antitrust legislation in the United States are discussed. Subsequently, special attention is given to both private enforcement and the DOJ's leniency policy. This chapter ends with a comparison between the American system and the European systems already discussed.

5.2 Antitrust in the United States

In the United States in the 19th century, industrialization led to output exceeding demand, which resulted in intense competition.[1049] Seeking greater profits and security, competitors created cartels.[1050] The large and powerful corporate monopolies that arose in the United States became the subject of public protest.[1051] In 1890, Congress passed the first antitrust legislation. With the passing of the Sherman Act, Congress banned agreements that restrained interstate or foreign trade, and they made it illegal for individuals to form or attempt to form monopolies.

The basic structure of the EU provisions, comprised of Articles 101 and 102 TFEU, finds its counterpart in Sections 1 and 2 of the American Sherman Act.[1052] To a large extent, Article 101 of the TFEU is comparable with Section 1 of the Sherman

1049. LeClair 2011, p. 65 et seq. See also Kwoka & White 2014.
1050. LeClair 2011, p. 65 et seq.
1051. Letwin 1965, p. 15. See also LeClair 2011.
1052. Gifford & Kudrle 2015, p. 2.

Act. Section 1 of the Sherman Act prohibits every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. To a large extent, Article 102 of the TFEU is comparable with Section 2 of the Sherman Act. Section 2 of the Sherman Act prohibits persons from monopolizing, attempting to monopolize, or combining or conspiring with any other person or persons, from monopolizing any part of the trade or commerce among the several States or with foreign nations.

In the beginning, the effectiveness of the antitrust legislation in the United States appeared to be limited, prompting additional legislation.[1053] In 1914, Congress passed the Clayton Act. The Clayton Act was more specific than the Sherman Act and made concentrations subject to controls.[1054] In this act, Congress banned price discrimination, corporate mergers, tying and exclusive dealing contracts, and interlocking directorates if it could substantially lessen competition or tend to create a monopoly. In 1914, Congress also passed the Federal Trade Commission Act. This law generally prohibited unfair competition methods and unfair or deceptive acts affecting commerce. The Federal Trade Commission Act also created a new regulatory agency: the Federal Trade Commission ("FTC"). The FTC has exclusive jurisdiction over the enforcement of the Federal Trade Commission Act. The rules established by the FTC are considered administrative codes. The FTC is authorized to enforce and regulate its rules with injunctions, lawsuits and administrative complaints if the FTC decides that an undertaking has violated the Federal Trade Commission Act. In 1936, Congress passed the Robinson-Patmann Act in order to protect small undertakings from being excluded from the market by large competitors. With this law, Congress sought to clarify the law on price discrimination as stated in the Clayton Act. Price discrimination was explicitly prohibited.

In 1978, the United States was the first country in the world to adopt a leniency policy. In the United States, the leniency applicant was protected from criminal conviction.[1055] Until the reform of 1993, however, the leniency policy appeared not to be very effective.[1056] This was because of the lack of transparency, certainty and sufficient incentives for infringing companies to apply for leniency.[1057] In 1993, the DOJ revised its leniency policy, making it more transparent, increasing the opportunities and raising the incentive for an undertaking to report criminal activity and cooperate with the DOJ.[1058] Under the 1978 leniency programme, violators who came forward and revealed their illegal activity before an investigation had begun were *eligible* to receive a complete pass from criminal prosecution.[1059] The DOJ held the identity of leniency applicants and the information they provided in strict confidence, affording them nearly the same treatment as confidential informants.[1060] The grant of leniency, however, was not automatic, and the DOJ re-

1053. Letwin 1965, p. 16 et seq.
1054. Appeldoorn & Vedder 2013, p. 29.
1055. Hammond & Barnett 2008, para 5.
1056. J J.R. Borell, Jiménez & Carcía 2012, p. 2.
1057. Hammond 2004.
1058. Ibid.
1059. Ibid, footnote 1. See also: Hammond 2000 (2); Spratling 1999 (1); Spratling 1998.
1060. Hammond & Barnett 2008, para 6.

tained substantial prosecutorial discretion in the decision-making process.[1061] In 1993, the leniency programme was revised in three major aspects.[1062] First, the leniency policy was changed to ensure that amnesty would be *automatic* if there was no pre-existing investigation.[1063] If an undertaking came forward prior to an investigation and met the programmes' requirements, the grant of leniency would be certain and would not be subject to the exercise of prosecutorial discretion.[1064] Second, the DOJ created a leniency alternative whereby amnesty would be available even if cooperation began *after* an investigation was underway.[1065] Third, if an undertaking qualified for automatic leniency, then all directors, officers, and employees who came forward with the undertaking and cooperated would also receive automatic amnesty.[1066] As a result of the 1993 amendments, the antitrust leniency policy appears to be much more successful. The leniency policy is a great help to the DOJ in uncovering cartels and prosecuting cartel members. Since 1993, there has been a nearly twenty-fold increase in the application rate, and the revised policy has resulted in uncovering large international cartels.[1067]

One of the most recent and most fundamental changes in antitrust legislation in the United States came with the 2004 approval of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"). On 22 June 2004, President George W. Bush signed ACPERA into law. The penalties for antitrust violations increased substantially. For an individual, the maximum fine increased from USD 350,000 to USD 1 million. Additionally, the maximum prison sentence increased from three to ten years. The maximum fine for an undertaking increased from USD 10 million to USD 100 million. Another important change resulting from ACPERA is the new provision that eliminates the trebling of damages for the infringing undertaking receiving immunity.[1068] Prior to 2004, an undertaking had to balance a significant countervailing factor against the benefits of the Corporate Leniency Policy as there was a high probability that civil lawsuits for treble damages would be filed against the undertaking. ACPERA limits damages for the leniency applicant to the damages suffered. Furthermore, with the introduction of ACPERA, the rule of joint and several liability on the part of the leniency applicant has been eliminated. The purpose of these new rules was to remove the possibly adverse consequences of private litigation (i.e. treble damages and joint and several liability) and, by doing so, to provide a significant additional incentive to undertakings and individuals to be the first to cooperate with the competition authority.[1069]

1061. Hammond 2004.
1062. Ibid.
1063. Ibid.
1064. Ibid.
1065. Ibid.
1066. Ibid.
1067. Borell, Jiménez & Carcía 2012, p. 2.
1068. ABA 2007, p. 758.
1069. See e.g. ABA 2009.

5.3 Similarities and Differences Between Europe and the United States

Both the United States and the European systems employ safeguards in order to prevent condemnation of corporate arrangements that benefit the public by guaranteeing efficiencies.[1070]

Although there are similarities, there are also several differences. Article 101 TFEU has an unique objective to facilitate the integration of the market economies of the Member States into one single market.[1071] According to the CJEU, Article 101 TFEU constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Union and, in particular, for the functioning of the internal market.[1072] Gifford and Kudrle note that, in fact, the competition policy was launched as an element of Europe's unification project.[1073]

In terms of the differences between the United States and European antitrust regimes, the differences can best be described from a historical perspective.[1074] Gifford and Kudrle describe that the relative absence of the residue of feudalism left the United States largely free of reactionary and revolutionary impulses.[1075] A doctrine of sharply limited government of the kind most Americans espouse, is typically only championed by minorities in Europe.[1076] They note that the history of Europe since the French revolution has generated a far broader array of basic postures towards government and its role in the economy.[1077]

As a variant of the liberal approach in the United States there was the *ordoliberal* approach in Europe which found its roots mainly in Germany.[1078] This approach holds that the state should ensure that the free market produces results close to its theoretical potential. According to this theory, the state is to be indispensable for the constitution and stabilization of the continuously aspired to competitive order.[1079]

A key element of the ordoliberal approach to competition law is enforcement by an independent agency of clearly stated principles. Bigger undertakings in Germany successfully lobbied for discretionary administrative intervention instead of clear prohibition.[1080] With the introduced system — that was taken over by the other Member States — there was more room for political intervention.[1081] Gifford and Kudrle state that European enforcement is more vulnerable to political influences.

1070. Gifford & Kudrle 2015, p. 2.
1071. CJEU 1 June 1999 (*Eco Swiss China Ltd v Benetton International NV*), point 36.
1072. Ibid.
1073. Gifford & Kudrle 2015, pp. 11 and 13. See also Van de Gronden 2017, pp. 24-25; Tierno Cantella 2016.
1074. Gifford & Kudrle 2015, p. 3.
1075. Ibid, p. 3.
1076. Ibid, p. 10.
1077. Ibid, p. 3.
1078. Ibid, p. 9.
1079. Ptak 2009, p. 125.
1080. Gifford & Kudrle 2015, p. 19.
1081. Ibid.

They also conclude that consumer welfare standard is embraced less consistently than in the United States.[1082] Other (national) interests, like supporting national champions for example, appear to play a role according to Gifford and Kudrle.[1083]

The role of private enforcement within the EU evidently differs from that in the United States, where punishment and the aim of deterrence are, next to providing compensation, the main objectives of private enforcement. This is historically determined. In the United States, private damages actions were a substitute for public enforcement because of a lacking effective public enforcement system.[1084] In Europe, punishment and deterrence remain the province of public authority to a large extent.[1085] The CJEU notes that actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union.[1086] However, the aim of introducing the Antitrust Damages Directive appears limited to protecting the leniency programme and to ensuring that victims of competition law infringements are able to receive compensation for harm caused by competition law infringements.[1087]

5.4 Private Enforcement in the United States

5.4.1 Introduction

According to Sullivan and Hovenkamp, private enforcement has had a major impact on the development of antitrust law.[1088] Müller showed that, in 2005, of the 818 antitrust actions commenced in US district courts, 796 (i.e. 97 percent) were private actions.[1089] O'Conner *et al.* state that by including a "private" component, US antitrust policy effectively outsources a portion of its enforcement role and gives taxpayers a massive return on essentially no investment.[1090] Lande and David assert that private enforcement has saved the US taxpayer tremendous enforcement costs by shifting to the legal counsel of private claimants the enormous burdens and risks of litigating against sophisticated, well-financed lawbreakers.[1091]

In the United States, at the start of the 20th century, scholars and politicians were already of the opinion that public enforcement alone was insufficient to combat antitrust violations. Victims should also be able to sue for compensation for the loss suffered because of competition infringements.[1092] Moreover, with the additional threat of being ordered by the civil courts to pay damages to non-government parties, competition infringers would be deterred even more from violating antitrust

1082. Gifford & Kudrle 2015, p. 20.
1083. Ibid, p. 23. See also Van de Gronden 2017, p. 25.
1084. Wils 2017, para 4.
1085. Gifford & Kudrle 2015, p. 20.
1086. CJEU 14 June 2011 (*Pfleiderer AG v BkartA*), point 29; CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 27.
1087. Gifford & Kudrle 2015, p. 20.
1088. Sullivan & Hovenkamp 2003, p. 70. See also Wils 2017.
1089. Müller 2010, p. 31. *Cf.* Foer & Stutz 2012, p. preface xix; Segal & Whinston 2006, p. 1.
1090. Foer & Stutz 2012, p. 289. See also Müller 2010, p. 40.
1091. Lande & Davis 2008, p. 905.
1092. Foer & Stutz 2012, pp. 4 and 11. See also Davis & Lande 2012, p. 6.

legislation.[1093] A third advantage of more private enforcement is that the work of the FTC and DOJ would become less demanding. No longer would all the work be on the shoulders of these public entities with their limited resources.[1094] In this way, private claimants would also function as enforcement agents of antitrust law in general. The United States Supreme Court stated: "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encourages persons to serve as 'private attorneys general".[1095] Consequently, private claimants would not only help themselves, but also perform a public service by doing the enforcement work of government bodies.[1096]

5.4.2 Private Enforcement System in the United States

The long history of private enforcement in the United States makes it interesting to compare the American system with the German and Dutch private enforcement systems and with the additional legislation resulting from the Antitrust Damages Directive. The following characteristics of United States private enforcement are discussed: the right to damages and collective redress; disclosure of information; the passing-on of overcharges; the effect of decisions; and the limitation period.

5.4.2.1 *Right to Damages and Collective Redress*

Section 4 of the Clayton Act provides that any person who has been injured in his "business or property" by reason of an antitrust violation, may sue to recover treble damages, costs of the suit, and attorney's fees.[1097] Once a violation, causation, and an injury have been found, the award of attorney's fees, costs, and treble damages is mandatory, except for the leniency applicant.[1098] The trial judge or jury has no discretion to modify it.[1099] In the United States, each infringer is liable for all damages resulting from the entire conspiracy and not just those attributable to its own conduct.[1100] A cartel infringer can be held jointly and severally liable for damages caused by the conspiracy.[1101] The United States Supreme Court has held that there is no right for contribution, meaning a cartelist has no right to sue the other cartelists to recover damages from them.[1102] According to the Supreme Court, there is no indication that Congress considered contribution among joint violators under the antitrust laws of the United States.[1103] It means that a cartel participant held liable must bear the entire amount of the damages for which it is held

1093. Foer & Stutz 2012, p. 7 et seq. See also Davis & Lande 2012, p. 8.
1094. *Cf.* Davis & Lande 2012, pp. 23 and 30.
1095. See Supreme Court 1 March 1972, *Hawaii v Standard Oil Co. of Cal.*, 405 U.S. 251, 262. See also Baer 2014.
1096. Foer & Stutz 2012, p. 289.
1097. Pak & Weick 2017, p. 364.
1098. Sullivan & Hovenkamp 2003, p. 70.
1099. Ibid.
1100. Pak & Weick 2017, p. 379. See for example Supreme Court 26 May 1981, *Tex. Indus., Inc. v Radcliff Materials, Inc.*, 451 US 630, 635—36, 101 S. Ct. 2061.
1101. Pak & Weick 2017, p. 379.
1102. Supreme Court 26 May 1981, *Tex. Indus., Inc. v Radcliff Materials, Inc.*, 451 US 630, 635—36, 101 S. Ct. 2061. *Cf.* Court of Appeal 2nd Circuit 25 July 1991, *Chemung Canal Trust Co. v Sovran Bank/Md.*, 939 F.2d 12, 17. See more information Foer & Stutz 2012, p. 244.
1103. Ibid.

liable. A cartel participant is not able to recoup damages from the other cartel participants.

The liability for treble damages and attorney's fees and costs, the inability to recoup part of the damages from co-infringers means that the exposure to defendants' claims is much more than just the actual loss or damage it caused to its own victims of the cartel. This huge exposure appears to be one of the important reasons why defendants in the United States are often willing to resolve antitrust claims by settling with claimants at an early stage.[1104]

Pursuant to Section 4 of the Clayton Act, any person who is injured in his business or property by reason of anything forbidden in the antitrust laws may file suit in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and recovers threefold the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

Under Section 4A of the Clayton Act, the United States is also able to claim damages. Pursuant to Section 4C of the Clayton Act, any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State to secure monetary relief for injury sustained by such natural persons to their property by reason of any antitrust violation.

Class actions

Federal Rule of Civil Procedure 23 permits private antitrust class actions to be brought. Class proceedings are not mandatory. Under Federal Rule of Civil Procedure 23(a), a party that seeks class certification must make a motion to the court and satisfy several prerequisites: the representative parties must be capable of fairly and adequately protecting the interests of the class; the members of the class must share a common question of law or fact; the class must be so numerous that joinder of all members is impractical; the claims or defenses of the class representatives must be typical of the claims or defenses of the members of the class.[1105]

In principle, the individual members of the class must be informed of the class action.[1106] The United States Supreme Court has held that some form of notice is constitutionally required, for it would be a violation of due process to adjudicate absent class members' rights without even letting them know that the case existed.[1107] When individual class members can be identified through reasonable effort, they must receive individual notice. This is often done by mail, but it could also be done with other instruments like newspapers, television and radio advertisements, internet web sites, and other methods likely to reach class members.[1108]

1104. *Cf.* Müller 2010, p. 102.
1105. ABA 2010, p. 152 et seq. See also Foer & Stutz 2012, p.113 et seq. where not four but six requirements are mentioned: numerosity; commonality, typically, adequacy of representation, predominance, and superiority.
1106. Bronsteen & Fiss 2003, p. 1434 et seq.
1107. Alexander 2000, p. 8.
1108. Ibid.

The notice procedure gives class members the opportunity to opt out of the class. For example, if individuals wish to proceed with their own litigation, they are entitled to do so if they inform the class counsel or the court that they are opting out of accordingly.[1109] If individuals do not want to be part of a class, or would rather bring their own lawsuit individually, or do not like the terms of the settlement, they can decline to be part of the class.[1110] Individuals opting out will not receive the benefits of any judgment in favor of the class and will not be bound by an unfavorable result.[1111]

It should be noted that the United States' legislator works on an amendment of the class action provisions. The Senate and the President still have to approve the amendments which are already accepted by the House of Representatives. If the amendments will become part of legislation, it is expected that it is more difficult for victims of cartel infringers to claim damages in antitrust cases collectively.[1112] The aim of the changes is to assure fairer, more efficient outcomes for claimants and defendants.[1113]

5.4.2.2 *Disclosure of Information*

In the United States, claimants enjoy a far-reaching pre-trial discovery process.[1114] There are several ways to obtain this information. The Federal Rules of Civil Procedures provide for initial disclosures, expert disclosures, and pretrial disclosures.[1115] Most states have similar rules.[1116] Litigants are required to make these disclosures.[1117] The rules also allow formal discovery requests, in which a party may request certain information.[1118] The discovery rules, found in Federal Rules of Civil Procedures Rules 26 — 37, are intended to provide parties with the means to find the location of relevant information, to narrow the scope of the discussion, and to obtain evidence for the procedure. [1119]

Federal Rule of Civil Procedure 26 allows discovery of a reasonable time, geographical and subject matter in the event the requested information is relevant for a claim or a defense and outweighs the burden imposed on the party that is requested to disclose the information.[1120]

1109. Bronsteen & Fiss 2003, p. 1441 et seq.
1110. Alexander 2000, p. 9.
1111. Ibid.
1112. Braeken *et al.* 2017.
1113. United States House of Representatives 2017.
1114. Pak & Weick 2017, p. 370.
1115. Foer & Stutz 2012, p. 181.
1116. Ibid.
1117. Ibid.
1118. Ibid.
1119. Ibid, p. 182.
1120. Pak & Weick 2017, p. 370.

There are limits to discovery.[1121] The scope of discovery is limited, recognizing that discovery could be unduly burdensome and could be used to embarrass or harass the other party.[1122] The discovery rules recognize that discovery may be restricted with regard to the disclosure of trade secret information or other confidential or commercially sensitive information.[1123] Compared to most European jurisdictions, American disclosure provisions are far more liberal.[1124] In the United States, private parties seeking damages for antitrust infringements can use the far-reaching pre-trial discovery rights to establish the case against an alleged cartelist.[1125] The discovery provisions assure parties equal access to information as long as it is not privileged and is relevant to the subject matter of the action prior to the trial.[1126]

Several scholars have stated that the broad discovery provisions are often abused to impose substantial costs on the defendants and to oblige the defendants to provide confidential information with the aim to settle rather than litigate the matter.[1127]

The DOJ holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants.[1128] Therefore, the DOJ does not publicly disclose the identity of a leniency applicant or information provided by the applicant, without prior disclosure by, or in agreement with, the applicant, unless required to do so by court order in connection with litigation.[1129] Information submitted to the DOJ can be subject to discovery in domestic courts in the United States. For this reason, submissions to the DOJ are typically oral, and not put in writing. Information submitted to the DOJ during the leniency process may be discoverable in foreign courts, depending on the applicable laws of those jurisdictions. Courts in the United States appear to concur / dissent on whether leniency and other information submitted in foreign jurisdictions can be made subject to discovery in American courts.[1130] Miller, Norlander and Owens conclude that the broad scope of the American civil discovery process remains a potential threat to the continued viability of the American and EU leniency programmes and to the preservation of the EU's specific procedures for sharing evidence with co-defendants during an anti-cartel prosecution under the aegis of confidentiality.[1131]

1121. Foer & Stutz 2012, p. 207.
1122. Pak & Weick 2017, p. 370; Foer & Stutz 2012, p. 207.
1123. Ibid.
1124. Müller 2010, p. 39.
1125. Ibid.
1126. Ibid.
1127. Ibid; Schnelle 2006, p. 195.
1128. Hammond & Barnett 2008.
1129. Ibid.
1130. See for example, District Court of Columbia, *Re Vitamins Antitrust Litigation*, Misc.No. 99-197 (D.D.C. 2002); District Court of the Northern District of California, *Re Methionine Antitrust Litigation*, Master File No. C99, 3491, Report of Special Master (N.D. Cal. June 17, 2002); District Court of the Northern District of California, *Re Rubber Chemicals* Antitrust Litig, 486 F. Supp. 2d 1078 (N.D. Cal. 2007). See also Miller, Nordlander & Owens 2010, pp. 10-14.
1131. Miller, Nordlander & Owens 2010, p. 14.

As discussed more extensively in Section 5.5, the introduction of ACPERA has resulted in requests for disclosure made to a leniency applicant or the information provided to the leniency applicant becoming less relevant in the United States in subsequent litigation. ACPERA provides that a leniency applicant must assist claimants in their antitrust damages actions against the other cartel infringers by providing relevant documents and witness testimony. In return, the leniency applicant's obligation to compensate victims of the cartel is reduced. In fact, with ACPERA, the Congress has provided claimants with an additional route to receiving information.

5.4.2.3 *The Passing-on Defense*

In the case of *Hanover Shoe*, United Shoe was found to have illegally monopolized the market for shoe manufacturing equipment, *inter alia* by forcing shoe manufacturers to lease rather than buy its best equipment.[1132] Hanover Shoe, a shoe manufacturer and lessee of United Shoe equipment sued for damages under Section 4 of the Clayton Act. United Shoe argued that the overcharge paid by Hannover Shoe did not lead to any injury under Section 4 of the Clayton Act, as Hanover Shoe had passed-on the overcharge to its own purchasers by raising prices in the downstream market. The Supreme Court held that an injury under Section 4 of the Clayton Act is suffered whenever an illegally higher price is paid, regardless of subsequent claims.

A defendant's liability in a Section 4 claim is not limited to the actual harm it brought to the claimant.[1133] The rationale for the Supreme Court's decision was the potential risk of limiting deterrence on the one hand, and avoiding complex litigation procedures on the other. The Supreme Court reasoned that a passing-on defense would reduce potential recovery by direct purchasers and therefore reduce the incentive to sue.[1134] Furthermore, according to the Supreme Court, it would fragment potential recovery among numerous indirect purchasers, each of which would have only a tiny stake in a lawsuit and hence very little interest in attempting a class action.[1135]

Nine years later, in the case of *Illinois Brick*, indirect purchasers of concrete blocks sued a manufacturer even though they had purchased the blocks via resellers.[1136] The Supreme Court denied standing to these indirect purchasers.[1137] In 1968, the Supreme Court reasoned that although this attempt to allocate the overcharge might seem reasonable in theory, it would add a whole new dimension of complexity to treble-damages suits and seriously undermine their effectiveness.[1138] As in the case of *Hanover Shoe*, the Supreme Court concluded that allowing indirect pur-

1132. Supreme Court 17 June 1968, *Hanover Shoe, Inc. v United Shoe Machinery Corp.* — 392 U.S. 481 (1968).
1133. Richman & Murray 2007, p. 74.
1134. Ibid, p. 74.
1135. Ibid.
1136. Supreme Court 9 June 1977, *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977). See also Richman & Murray, 2007, p. 75.
1137. Supreme Court 9 June 1977, *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977).
1138. Ibid. See also Richman & Murray 2007, p. 76.

chasers to divide the amount recovered amongst them would reduce the incentive to claim damages, given the relatively small size of the damages awarded to the individual indirect victim.[1139]

Nevertheless, in the *Illinois Brick* case, the Supreme Court made clear that there are potential exceptional situations in which indirect purchasers may pursue damages claims under federal antitrust legislation.[1140] A claimant may have standing in the situation of a pre-existing cost-plus contract with the purchaser, in which the indirect buyer commits to buying a fixed quantity.[1141] What is important for this potential exception is the requirement of a "cost-plus" arrangement, under which a product is sold at a specified mark-up above the seller's own cost.[1142] Moreover, the indirect purchaser should have entered into an obligation to purchase a fixed amount of the product or service.[1143] Besides the exception of indirect purchasers on the basis of a cost-plus contract, indirect purchasers may also be permitted to sue in lieu of the direct purchaser if the violator of the infringement owns or controls the direct purchaser.[1144] And there are also two other exceptions. The first is when the direct purchaser is a member of the conspiracy.[1145] The second is when the indirect purchaser "acquires" standing by receiving an express and specific assignment from a direct purchaser.[1146]

The dissenting judges in the *Illinois Brick* case made clear that this outcome (i.e. indirect purchasers not being able to claim damages) abandoned another rationale for bringing a private claim: the need to compensate the injured parties.[1147] They protested that barring indirect purchasers from bringing a claim would ultimately bar consumers from claiming damages.[1148] The dissenting judges' opinion is more in line with the decisions of the CJEU.[1149] In Europe, every victim able to prove damages as a result of a competition law infringement may claim damages, whereas under federal legislation in the United States, indirect victims of a cartel are not able to claim for damages, with some exceptions.

In the case of *Kansas v UtiliCorp*, the Supreme Court denied standing to consumers who paid overblown natural gas prices to an intermediary (a public entity).[1150] Even though the public utility passed-on the overcharge charged by gas suppliers to consumers pursuant to a fixed markup set up by regulators, the Supreme Court refused to apply the cost-plus exception described in the cases of *Hanover Shoe* and

1139. Richman & Murray 2007, p. 77.
1140. Foer & Stutz 2012, p. 80.
1141. Ibid.
1142. Ibid, p. 81. See also Pak & Weick 2017, p. 375.
1143. Foer & Stutz 2012, p. 81.
1144. See *inter alia* Court of Appeal 29 August 1980, 6th Circuit, *Jewish Hosp. Assn. v Stewart Mech. Enterps.* 628 F.2d 971, 975 (6th Cir. 1980). See also Foer & Stutz 2012, p. 81; Pak & Weick 2017, p. 375.
1145. Foer & Stutz 2012, p. 82.
1146. Ibid.
1147. Richman & Murray 2007, p. 77.
1148. Ibid.
1149. CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*); CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*).
1150. Supreme Court 21 June 1990, *Kansas v UtiliCorp United*, 497 U.S. 199 (1990).

Illinois Brick.[1151] The Supreme Court has not spoken on this issue since the indirect purchaser rule was stated.[1152] The case of *Kansas v UtiliCorp* indicates that the viability of the cost-plus exception is questionable.[1153] Some courts have expressly questioned whether the cost-plus exception still exists.[1154]

The indirect purchaser rule has been the subject of much criticism.[1155] For example, according to several commentators, direct purchasers often do not have an incentive to sue as they have passed-on the overcharge. Besides the fact that they are not harmed, direct purchasers are often reluctant to disrupt important supplier relationships. Hence, it is likely that direct purchasers are often less reliable private enforcers than indirect purchasers.[1156]

Notwithstanding the failure to reform the passing-on defense on a national basis, the political backlash against the decision was widespread.[1157] Contradicting the Supreme Court's indirect purchasers rule and denying the passing-on defense, several states have adopted statutes giving indirect purchasers a cause of action to enforce state competition laws.[1158] These so-called "*Illinois Brick* repealer statutes", in addition to enabling parallel litigation at state and federal levels (and hence adding to the complexity of the litigation), introduced an additional dimension to the debate on the passing-on defense.[1159]

It has been questioned whether these *Illinois Brick* repealer statutes were validly passed by the states. The Supreme Court has upheld indirect purchaser recovery under these Illinois repealer statutes, stating that they were not preempted by federal antitrust law:[1160]

> "*When viewed properly, Illinois Brick was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which Illinois Brick was based provide no support for a finding that state indirect purchaser statutes are preempted by federal law. The judgment of the Court of Appeals is therefore reversed.*"

With the introduction of the *Illinois Brick* repealer statutes, however, claimants will commence their suits in the most suitable forum. There is a possibility of forum shopping given that there are differences between the federal rules and the rules of the various states.[1161] Indirect purchasers will have to claim damages under state law, whereas direct claimants can often choose between the federal and state levels.

1151. Supreme Court 21 June 1990, *Kansas v UtiliCorp United*, 497 U.S. 199 (1990).
1152. Richman & Murray 2007, p. 81.
1153. Foer & Stutz 2012, p. 81.
1154. Ibid.
1155. See e.g. Kloub 2011, p. 88.
1156. Richman & Murray 2007, p. 85.
1157. Ibid.
1158. Ibid.
1159. Ibid, p. 86.
1160. Supreme Court 18 April 1989, *California v ARC America Corp.*, 490 U.S. 93 (1989). See also Richman & Murray 2007, p. 86; Kloub 2011, p. 89.
1161. Foer & Stutz 2012, p. 154 et seq.

A claimant would have to assess whether its choice is defensible or whether there might be a jurisdiction problem. Mainly because of the differences in the regulations at the state and federal levels, and between states, private enforcement litigation has become complex, a situation which has prevented efficient litigation. One of the Supreme Court's arguments for denying standing to indirect purchasers was the avoidance of litigation complexity. It can be concluded, however, that the outcome of prohibiting indirect purchasers from claiming damages at the federal level but not on a state level has had the opposite effect.[1162]

In addition, next to the treble damages, the overcompensation of the direct victims combined with the compensation of the indirect victims may result in an obligation to pay more damages than the loss or damage actually suffered by the victims.

Furthermore, facilitating private enforcement of antitrust laws only by direct purchasers may be insufficient. Direct purchasers do not always have an incentive to sue. They often have an interest in maintaining a good relationship with the supplier. Moreover, direct purchasers are often able (at least partly) to pass-on an overcharge. The Supreme Court's prohibition against indirect purchasers claiming damages even appears to have had an adverse outcome.[1163] Although the Supreme Court feared limiting deterrence, denying indirect purchasers from compensation could limit the *deterrence* factor.[1164]

5.4.2.4 *Effect of National Decisions*

One of the unique factors of private enforcement is the multiplicity of claimants, both governmental and private, authorized to challenge allegedly unlawful conduct under federal and state antitrust laws.[1165] The private enforcement system in the United States has evolved into a system consisting of two federal antitrust agencies, additional federal agencies that review industry-specific transactions, 50 state attorneys general and thousands of private parties.[1166]

Depending on the case, a final criminal or civil judgment in a government antitrust action may have either a *prima facie* effect (i.e. unless rebutted, it is sufficient to prove the violation) or a conclusive effect in subsequent private litigation (i.e. a collateral estoppel effect).[1167] Under the collateral estoppel doctrine, a judgment in one case is conclusive on the issues litigated in that case between those parties, and a party from that earlier case is precluded from re-litigating the issues from that case in a different, subsequent legal action, provided certain criteria are met.[1168]

The court has a broad discretion to decide whether collateral estoppel would be fair in any particular case. Even where the requirements of collateral estoppel are

1162. See also Richman & Murray 2007, p. 89.
1163. BGH 28 June 2011, KZR 75/10, point 30 et seq. See also Braat 2013, p. 323.
1164. Ibid.
1165. Foer & Stutz 2012, p. 281.
1166. Ibid.
1167. Pak & Weick 2017, pp. 375-376; Fischel 1975, pp. 339-340.
1168. Foer & Stutz 2012, p. 286.

not satisfied, Section 5(a) of the Clayton Act still provides an invaluable advantage to private claimants.[1169] If a court ultimately refuses to apply collateral estoppel, the prior final judgment may nonetheless be offered as *prima facie* evidence of liability in private litigation under Section 5(a) of the Clayton Act.[1170] Claimants may use prior government rulings to establish their *prima facie* case, essentially arriving at the courthouse steps with a rebuttable presumption of having proved their case.[1171]

5.4.2.5 *Limitation Period*

Section 4(b) of the Clayton Act creates a four-year limitation period for antitrust damage actions.[1172] The limitation period begins when the cause of action accrues, which generally does not happen until damages are ascertainable. If the violation has already arisen, but the existence of injury is unknown, or the damage is only speculative, then the limitation period will not begin. Generally, this implies that a claimant must file its claim within four years following the defendant's injurious act, once the claimant was or should have been aware of the existence and source of the injury.[1173]

For example, if a secret cartel is formed in 2006 but is not discovered and broken up until 2011, the limitation period will not begin to run until 2011. Likewise, distinctive, repeated actions may serve to re-start the running of the limitation period.[1174]

Besides the four-year limitation period, the Clayton Act authorizes the suspension of the running of a limitation period for a civil action if the DOJ or the FTC pursues a criminal or civil cause of action against the targeted defendants.[1175] The Clayton Act provides that whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under Section 15a, the running of the limitation period is suspended during the pendency thereof and one year later.[1176] Suspending the running of a limitation period during governmental litigation seeks to balance the competing policy objectives of the antitrust laws.[1177] On the one hand, the policy retains private litigation as a tool for effective enforcement of the antitrust laws.[1178] On the other hand it provides legal certainty in applying the statute's tolling provision to avoid overly prolonged antitrust litigation.[1179]

1169. Foer & Stutz 2012, p. 286.
1170. Müller 2010, p. 40 et seq.
1171. Von Klinowski 2006, p. 169.
1172. Stewart 1985, p. 70 et seq. See also Pak & Weick 2017, pp. 364-365.
1173. Foer & Stutz 2012, p. 251.
1174. Stewart 1985, p. 71.
1175. Foer & Stutz 2012, p. 252.
1176. Clayton Act, 15 U.S.C. § 16(i) (2009).
1177. Foer & Stutz 2012, p. 252.
1178. *Cf.* Court of Appeal for the Fourth Circuit, *Novell, Inc. v Microsoft Corp.* 505 F.3d 302, 320 (4th Cir. 2007).
1179. Ibid.

5.5 Leniency Policy in the United States

5.5.1 Introduction

The DOJ has a policy of providing leniency to an undertaking that reports its illegal activity at an early stage.[1180] Providing leniency in the United States means not charging the undertaking criminally for the activity reported.[1181]

An undertaking can avoid criminal conviction and fines, and an individual can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the DOJ, and meeting specified conditions set out in the DOJ's leniency programme.

5.5.2 Enforcement by the DOJ

The antitrust division of the DOJ is the sole enforcer of criminal federal antitrust laws. The leniency programme applies to criminal violations of Section 1 of the Sherman Act, which is the primary criminal statute enforced by the DOJ. The wording in Section 1 of the Sherman Act does not indicate whether certain violations are to be addressed criminally or civilly, but the DOJ has a long-standing policy of seeking criminal indictments only in cases involving "per se" violations of Section 1, such as agreements to fix prices, bid-rigging, or market or purchaser allocation.

5.5.3 Developments in the United States' Leniency Programme

The DOJ first implemented a leniency programme in 1978. Under this programme, the DOJ received approximately one leniency application per year.[1182] The programme did not lead to the detection of a single international cartel.[1183]

Over the last decades, the cartel enforcement landscape has changed dramatically. In the early 1990s, the sanctions imposed in criminal cartel cases brought by the DOJ were considered insufficiently severe, and the original Corporate Leniency Programme was not providing cases.[1184] This has changed substantially. In the last decades, the world has seen an expansion of effective leniency programmes, ever-increasing sanctions for cartel offenses, a growing global movement to hold individuals criminally accountable, and increased international cooperation among enforcers in cartel investigations.[1185] Nowadays, in over 90 percent of the cartel cases in the United States, leniency applicants assist in the investigations.[1186]

1180. Foer & Stutz 2012, p. 183.
1181. Ibid.
1182. Hammond 2004.
1183. Ibid.
1184. Hammond 2010.
1185. Ibid.
1186. Ibid. See also Ghosal & Sokol 2016, p. 411.

The DOJ has spent the last two decades building and implementing a *carrot and stick* enforcement strategy.[1187] This strategy couples rewards for voluntary disclosure and timely cooperation pursuant to the DOJ's Corporate Leniency Programme on the one hand and severe sanctions on the other.[1188] The DOJ substantially revised the programme with the issuance of the Corporate Leniency Policy of 1993 and the Leniency Policy for Individuals in 1994. Making its leniency policy more transparent, the DOJ increased the opportunities, and raised the incentives, for companies to report criminal activity and cooperate with the DOJ.[1189] The leniency policy became more predictable for undertakings. Since then, there has been nearly a twenty-fold increase in the application rate, and it has resulted in cracking dozens of large international cartels, convictions and jail sentences for culpable American and foreign executives, and considerable corporate fines.[1190]

Although the leniency programme encouraged violators of antitrust laws to reveal their conduct to the DOJ, a primary concern was that litigation would likely follow from a DOJ investigation, which would reduce the incentives for early cooperation with the antitrust authority.[1191] In response to this concern, ACPERA was passed in 2004.[1192] ACPERA encourages self-reporting by substantially limiting civil liability for a leniency-qualifying undertaking. ACPERA provides that undertakings that successfully enter the leniency programme will have to pay only the actual damages (as opposed to treble damages) plus attorneys' fees, costs, and interest.[1193] ACPERA immunizes the leniency applicant from joint and several liability for the acts of their co-conspirators.[1194] With ACPERA, the amount of damages to be paid by the leniency applicant for an antitrust violation litigated under federal or state law is limited under both federal and state laws, whereas competitors that do not receive amnesty can be sued, and obliged to pay all the damages awarded multiplied by three.[1195]

Congress chose to increase the incentives for illegal-cartel participants to cooperate with antitrust prosecutors. According to Harrison and Bell, this has been accomplished by statutorily limiting cooperating undertakings' civil liability to actual damages rather than treble damages in return for the undertaking's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct.[1196]

Harrison and Bell argue that the risk of treble damages under the Clayton Act appeared to be the greatest deterrent to applying for amnesty after 1993.[1197] According to them, treble damages actions and the existence of joint and several liability may

1187. Hammond 2010.
1188. Ibid.
1189. Hammond 2004. See also Ghosal & Sokol 2016, p. 411; Harrington 2008, pp. 215-246.
1190. Hammond 2004; Hammond 2010.
1191. Foer & Stutz 2012, p. 183.
1192. Ibid, p. 183 and 290.
1193. Ibid, p. 183 and 290.
1194. Ibid, p. 183.
1195. Ibid.
1196. Harrison & Bell 2006, p. 223.
1197. Ibid, pp. 224-225.

even have served as a deterrent to organizations that have considered reporting violations to antitrust agencies outside of the United States.[1198]

Harrison and Bell state that ACPERA "sweetens incentives for antitrust violators to cooperate under the Antitrust Division's leniency programme."[1199] They conclude that with ACPERA, the legislator is attempting to lessen the risks associated with the decision to apply for amnesty.[1200] Harrison and Bell also refer to a statement made by Senator Hatch:[1201]

> *"Though this program has been successful, a major disincentive to self reporting still exists – the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy. . . This provision addresses this disincentive to self-reporting. Specifically, it amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages. In other words, the total liability of a successful leniency applicant would be limited to single damages without joint and several liability. Thus, the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy."*

Hence, in addition to immunity from prosecution by the government, a successful leniency applicant is exempt from civil treble-damages liability. Besides de-trebling the damages, another incentive to cooperate is the amnesty from joint and several liability for the cooperating defendant in subsequent civil litigation.[1202] At the same time, the claimants remain able to recover full and treble damages from each of the other cartel infringers.

To obtain this relief, the leniency applicant must cooperate with the claimants, providing witnesses and documents to help them build cases against the other defendants.[1203] Hence, the leniency applicant not only has to assist the public authorities, but also the private claimants, and in return receives immunity from criminal punishment and a reduction of the compensation to be paid.

ACPERA requires the leniency applicant to cooperate satisfactorily with claimants in civil procedures by providing them with documentation and reasonable access to potential witnesses without unreasonable delay.[1204] Several legal practitioners have criticized the vagueness of the term "satisfactory cooperation".[1205] It is often the subject of courtroom discussion.[1206]

In addition to the incentives to apply for leniency, ACPERA also provides an incentive to victims of a cartel to claim damages. Since the leniency applicant will help

1198. Harrison & Bell 2006, pp. 224-225.
1199. Ibid, p. 223.
1200. Ibid.
1201. Hatch 2004.
1202. Hausfeld & Sweeney 2017, pp. 8-9.
1203. Harrison & Bell 2006, p. 226.
1204. Hausfeld & Sweeney 2017, p. 9 et seq; Foer & Stutz 2012, pp. 184 and 385-386.
1205. Manning 2012.
1206. Ibid.

the claimants in filing suit against the other antitrust violators, it will be easier for claimants to successfully sue the other cartel infringers.

Hausfeld states that, since the advent of ACPERA and the amendment to limit civil liability, amnesty applications have markedly increased, as have successful investigations and the collection of fines.[1207]

The DOJ believes that limiting damages has made its Corporate Leniency Programme "even more effective" at detecting and prosecuting cartels.[1208]

In May 2009, in a letter sent by the Antitrust Section of the American Bar Association (ABA) to the Senate and House of Representatives,[1209] the ABA drew attention to the existing debate about whether the actual damages limitation in ACPERA is effective.[1210] The ABA stated that those in favor of the de-trebling provision point out that by reporting cartel conduct, an amnesty applicant is, in many cases, effectively ending an ongoing crime. Reporting the crime to the DOJ, in many cases, ultimately has the effect of alerting the victims of the crime.[1211] Further, by tying the damages limitation to cooperation with the civil claimants, ACPERA makes it more likely for the victims of the crime to ultimately receive compensation for their losses.[1212] Early cooperation of the amnesty applicant with the civil claimants makes it more likely for claimants to be able to build strong cases against other members of the conspiracy.[1213]

According to its proponents, the de-trebling provision removes a barrier to reporting criminal conduct. Many view the provision as a useful means to encourage firms to come forward and cooperate with the DOJ, and increase the level of cooperation available to claimants.[1214] The ABA stated that the provision maintains the total potential recovery available to civil claimants. It improves their chances of obtaining that recovery by requiring the leniency applicant to cooperate with the civil claimants.[1215] The ABA points out that ACPERA provides that a leniency applicant is eligible for the damages limitation only after the court has affirmatively determined that the leniency applicant has provided satisfactory cooperation to the civil claimants.[1216] According to the ABA, this provision ensures that the victims of the conduct will, in exchange for lower damages from the leniency applicant, receive meaningful cooperation that will make them better able to obtain recovery from the other members of the conspiracy.[1217]

1207. Hausfeld 2009. See also Barnett 2006.
1208. ABA 2009.
1209. Ibid.
1210. Ibid.
1211. Ibid.
1212. Ibid.
1213. Ibid.
1214. Ibid.
1215. Ibid.
1216. Ibid.
1217. Ibid.

Others in the field are less convinced of the effectiveness of the ACPERA rules for de-trebling. Leveridge and Martin hold that in recent years there has been no evidence that de-trebling has incentivized companies to seek amnesty.[1218] According to critics, undertakings seek amnesty today for the same reasons they did before ACPERA, i.e. to avoid prison sentences for high-level executives, to escape significant criminal fines, and to win the "prisoner's dilemma" race to obtain amnesty.[1219] In their view, the real determining factors for seeking corporate amnesty are the same: (1) high-level executives being able to avoid prison terms; (2) minimizing exposure on a global scale; and (3) winning the race to the courthouse to obtain amnesty.[1220] The ABA states that according to the opponents of de-trebling, de-trebling does not appear to add anything.[1221] In addition, the opponents argue that corporate amnesty applicants have routinely resolved civil cases in the United States in exchange for cooperation and relatively small settlement amounts representing single damages or less based on the volume of sales by the amnesty applicant, rather than total sales.[1222] In other words, according to the critics, the de-trebling measurement does not have a particularly significant effect.

In 2004, legislators decided that the de-trebling clause would be in force for five years. After those five years, the recovery limitations would be renewed if the de-trebling had proved to be an effective incentive for cartel conspirators. If the experiment failed and the de-trebling provision lapsed, the enhanced fines and imprisonment terms would automatically be reinstated.

According to the ABA, five years turned out to be an insufficient amount of time to assess the effectiveness of the damages limitation.[1223] The ABA made clear that it was difficult to gauge the effectiveness of the provision based on the limited record thus far.[1224] Nor were there any reported cases discussing the implications of the leniency applicant's requirement to cooperate with the civil claimants.[1225]

In July 2011, the US Government Accountability Office published a report concerning the 2004 antitrust reforms.[1226] The US Government Accountability Office found that ACPERA may have resulted in little change in the number of leniency applications submitted: 78 had been submitted in the six years before ACPERA versus 81 in the six years after.[1227] Furthermore, the US Government Accountability Office concluded that most defense attorneys representing leniency applicants indicated that ACPERA's offer of relief from some civil damages had only a slightly positive effect on leniency applicants' decisions to apply for leniency; the threat of jail time

1218. Leveridge & Martin 2009.
1219. ABA 2009.
1220. Leveridge & Martin 2009.
1221. ABA 2009.
1222. Ibid.
1223. Ibid.
1224. Ibid
1225. Ibid.
1226. GAO Report 2011.
1227. Ibid, p. 16 et seq.

and corporate fines appeared to be the most motivating factors both before and after ACPERA's enactment.[1228]

The US Government Accountability Office also concluded that after the ACPERA's enactment, nearly twice as many successful applicants reported criminal cartel activity about which the DOJ had no prior knowledge. In addition, higher fines and jail times were imposed in criminal cartel cases after the ACPERA's enactment, although DOJ officials emphasized that neither trend is primarily attributable to ACPERA.[1229] Other factors — such as an increase in leniency programmes in other countries — may also have affected the number and types of leniency applications submitted over this time period, making it difficult to isolate ACPERA's impact.[1230] The US Government Accountability Office also paid attention to how the ACPERA possibly affected claimants and defendants in civil proceedings. Claimants' attorneys from most of the civil cases indicated that ACPERA's cooperation provision — which provides the leniency applicant with relief from civil damages in exchange for cooperation with claimants — had strengthened and streamlined their cases.[1231] Based on several interviews, the US Government Accountability Office concluded that the claimants' cases were strengthened in two ways: it helped to prove the case and it helped claimants to reach higher settlements with non-leniency defendants.[1232]

From the above, it can be concluded that although other factors also play a role, ACPERA appears to have at least some positive influence on the overall effectiveness of competition law enforcement. De-trebling the damages and removing joint and several liability have possibly led to more successful applicants reporting criminal cartel activity to the DOJ. Although it can be argued that other factors played a role in the total number of leniency applications and the total number of leniency applications did not significantly increase, the number of cases in which leniency applications led to knowledge about cartels previously unknown to the DOJ increased once ACPERA was introduced. Furthermore, it is equally interesting that because of the ACPERA rules on assisting claimants in private proceedings, private litigation appears to be easier and more beneficial for a claimant, as the assistance of the leniency applicant is considered useful. This assistance strengthens claimants' cases by assisting in proving the case and helping claimants to reach higher settlements with non-leniency defendants.

As the de-trebling clause was a five-year sunset provision, lawmakers had to decide whether to extend the provision. In June 2009, they decided to postpone the expiration of ACPERA by one year. In 2010, the Congress passed a bill extending the civil leniency provisions of the ACPERA for another ten years. With this extension, ACPERA's civil leniency provisions will expire on 22 June 2020. Depending *inter alia* on surveys regarding the effectiveness of the ACPERA clauses, such as the GAO report, the Congress will decide in 2020 whether or not to extend the provision.

1228. GAO Report 2011, p. 15 and 20.
1229. Ibid, p. 19.
1230. Ibid, p. 21.
1231. Ibid, p. 26.
1232. Ibid, p. 27.

As it seems to have positive consequences for the overall legal antitrust system, and negative consequences are unlikely, the author's conservative assessment is that the provision will remain part of the legislation beyond 22 June 2020 as well.

5.5.4 Current Leniency Policy

5.5.4.1 *Introduction*

As already described, through the DOJ's leniency policy, undertakings and individuals can avoid criminal conviction, prison terms, and fines by being the first to confess participation in a criminal antitrust violation, fully cooperating with the DOJ and meeting other specified conditions.[1233] As described above, since 1993 the DOJ has heavily relied on the leniency programme to uncover and prosecute illegal cartel activity.[1234] Leniency is available for undertakings either before or after a DOJ investigation has begun. The Corporate Leniency Policy includes two types of leniency: "Type A Leniency" and "Type B Leniency".

5.5.4.2 *Immunity*

Type A Leniency is available only before the DOJ has received any information about the activity being reported from any source. Type B is available even after the DOJ has received information about the activity.

Leniency Before an Investigation Has Begun (Type A)
Leniency is granted to an undertaking reporting illegal antitrust activity before an investigation has begun if the following six conditions are met:

i. at the time the undertaking comes forward, the DOJ has not received information about the activity from any other source;
ii. upon the undertaking's discovery of the activity, the undertaking took prompt and effective action to terminate its participation in the activity;
iii. the undertaking reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the DOJ throughout the investigation;
iv. the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
v. where possible, the undertaking makes restitution to injured parties; and
vi. the undertaking did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the undertaking does not meet all six conditions of the Type A Leniency, it may still qualify for leniency if it meets the conditions of Type B Leniency.

Alternative Requirements for Leniency (Type B)
After the DOJ has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, an undertaking qualifies for leniency if the following conditions are met:

1233. GAO Report 2011, p. 7.
1234. Ibid, p. 1.

i. the undertaking is the first to come forward and qualify for leniency with respect to the activity;
ii. at the time the undertaking comes in, the DOJ does not have evidence against the undertaking that is likely to result in a sustainable conviction;
iii. upon the undertaking's discovery of the activity, the undertaking took prompt and effective action to terminate its part in the activity;
iv. the undertaking reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the DOJ in its investigation;
v. the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
vi. where possible, the undertaking makes restitution to injured parties; and
vii. the DOJ determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing undertaking's role in the activity, and when the undertaking comes forward.

In the following, some characteristics of the American leniency programme are further discussed.

5.5.4.3 *Not the Leader or Originator*

Part A of the Corporate Leniency Policy requires that "[t]he corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity." Similarly, Part B of the Corporate Leniency Policy requires that: "The Division determined that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward."

The leniency policy refers to "*the* leader" and "*the* originator of the activity" rather than "*a*" leader or "*an*" originator. The DOJ makes clear that applicants are disqualified from obtaining leniency only if they were clearly the single organizer or single ringleader of a conspiracy.[1235] If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency.[1236] Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for leniency.[1237] In addition, an applicant will not be disqualified under this condition just because it is the largest undertaking in the industry or has the greatest market share if it was not clearly the single organizer or single ringleader of the conspiracy.[1238] Wherever possible, the DOJ has construed or interpreted its programme in favor of accepting an applicant into the leniency programme in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.[1239]

1235. Hammond & Barnett 2008, paras 13 and 14. See also Spratling 1998.
1236. Hammond & Barnett 2008, paras 13 and 14.
1237. Ibid.
1238. Ibid.
1239. Ibid.

5.5.4.4 *The Winner Takes It All*

Under both Type A and Type B, only the first qualifying undertaking may be granted leniency for a particular antitrust conspiracy. Condition (i) of Type A leniency requires that the DOJ has not yet received information about the illegal antitrust activity being reported from any other source, and Condition (i) of Type B leniency requires that the undertaking be the first to come forward and qualify for leniency.

Under the policy that only the first qualifying undertaking receives conditional leniency, there have been severe differences in the disposition of the criminal liability of undertakings whose respective leniency applications to the DOJ were very close in time. The winner takes it all. If an undertaking applies for leniency only one minute after the other undertaking, the second applicant will receive nothing from its leniency application. Meanwhile, the other undertaking will receive immunity from criminal sanctions and could reduce the damages to be paid in private enforcement actions.

5.5.4.5 *Amnesty-Plus and Penalty-Plus*

The Amnesty-Plus rule is a part of the American leniency programme and is worth mentioning. If an undertaking is under investigation for an antitrust conspiracy but is too late to obtain leniency for that conspiracy, it can still receive benefits in its plea agreement for that conspiracy by reporting its involvement in another antitrust conspiracy. The undertaking will receive immunity from prison terms and fines in the other cartel, and in addition, the DOJ will recommend to the sentencing court that the undertaking receive a substantial additional reduction in its fine for its participation in the first cartel.

A large percentage of the DOJ's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy. This pattern has led the DOJ to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete.

An undertaking that decides not to take advantage of the Amnesty Plus opportunity risks potentially harsh consequences ("*Penalty-Plus*").[1240] If an undertaking participates in a second antitrust offense but does not report it, and the conduct is later discovered and successfully prosecuted, where appropriate, the DOJ will urge the sentencing court to consider the undertaking's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor.[1241] The DOJ will request that the court impose a term and conditions of probation for the undertaking pursuant to U.S.S.G. §8D1.1, and the DOJ will pursue a fine or jail sentence at or above the upper end of the Guidelines range.[1242] Moreover, where multiple

1240. Griffin 2003.
1241. Ibid.
1242. Ibid.

convictions occur, an undertaking's or individual's guidelines calculations may be increased on the basis of prior criminal history.[1243] For an undertaking, the failure to self-report under the Amnesty Plus programme could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all in relation to the other cartel. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.[1244]

5.5.4.6 *Restitution to Injured Parties*

Pursuant to the Corporate Leniency Policy, undertakings make restitution to injured parties. Paragraph 2(g) of the model leniency letter requires that the applicant make "all reasonable efforts, to the satisfaction of the DOJ, to pay restitution." Thus, the applicant must demonstrate to the DOJ that it has satisfied its obligation to pay restitution before being granted final leniency.[1245] Restitution is normally resolved through civil actions with private claimants.

There is a strong presumption in favor of requiring restitution in leniency situations. Restitution does not have to take place only where, as a practical matter, it is not possible.[1246] Examples of situations where an applicant might be excused from making restitution include circumstances where the applicant is bankrupt and prohibited by court order from undertaking additional obligations, or where there was only one victim of the conspiracy and it is now defunct.[1247] Another example of a situation where the DOJ will not require the applicant to pay full restitution is if doing so will substantially jeopardize the organization's continued viability.[1248]

5.5.4.7 *Cooperation with private claimants*

As comprehensively discussed in Section 5.5.3, the new ACPERA rules provide that the immunity recipient does have an incentive to cooperate satisfactorily with private claimants. The leniency applicant can avoid treble damages and joint and several liability if it cooperates with private claimants satisfactorily. In other words, if it helps claimants with their claims against the other cartel infringers.[1249]

5.5.4.8 *Marker Protection*

The DOJ has established a marker system to hold an applicant's place in line for leniency while the applicant gathers more information to support its leniency application. Many foreign authorities, including in Germany and the Netherlands, as well as the European Commission, have adopted the idea of a marker system.

1243. Griffin 2003.
1244. Hammond & Barnett 2008, para 20.
1245. Ibid.
1246. Ibid.
1247. Ibid.
1248. Ibid.
1249. Hausfeld & Sweeney 2017, p. 11 et seq. GAO Report 2011, p. 26.

The DOJ states that it understands that when a corporate counsel first obtains indications of a possible criminal antitrust violation, the undertaking's managers may not have sufficient information to know for certain whether the undertaking has engaged in such a violation. It may be too early to admit to a violation, but an admission is required to obtain a conditional leniency letter.[1250]

In this situation, the DOJ frequently gives a leniency applicant a marker for a finite period of time to hold its place at the front of the line for leniency. The counsel gathers the additional information through an internal investigation to perfect the client's leniency application. The marker ensures in effect that no other undertaking can "leapfrog" the applicant with the marker.[1251]

To obtain a marker, a counsel must do the following: (1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation (e.g. price fixing, bid rigging, capacity restriction, or allocation of markets, purchasers, or sales or production volumes); (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the DOJ to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client.[1252]

With respect to the product or service involved in the violation, in some cases, identification of the industry is sufficient for the DOJ to determine whether leniency is available.[1253] For example, there may be no pending investigations of any products or services in that particular industry. In other cases, identification of the specific product or service or other identifying information, such as the geographic location of affected purchasers or one or more of the subject companies, may be necessary in order for the DOJ to determine whether leniency is available.[1254]

Because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low, particularly in situations where the DOJ is not already investigating the wrongdoing. The burden is higher when the DOJ is already in possession of information about the illegal activity.[1255]

A marker is provided for a limited period.[1256] The length of time an applicant is given to perfect its leniency application depends on factors such as the location and number of undertaking employees that the counsel needs to interview, the amount and location of documents the counsel needs to review, and whether the DOJ already has an ongoing investigation at the time the marker is requested.[1257]

1250. Hammond & Barnett 2008, para 2.
1251. Department of Justice 2012, pp. 99-100. See also Hammond & Barnett 2008, para 2.
1252. Hammond & Barnett 2008, para 2.
1253. Ibid.
1254. Ibid.
1255. Ibid.
1256. See Department of Justice 2012, pp. 99-100.
1257. Hammond & Barnett 2008, para 2.

A 30-day period for an initial marker is common, particularly in situations where the DOJ is not yet investigating the wrongdoing.[1258] At the DOJ's discretion, if necessary, the marker may be extended for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.[1259]

5.6 Evaluation of Competition Law Enforcement in the US and Comparison with Europe

Concerning private enforcement, the United States is far ahead of Europe in terms of the number of cases. As discussed in Chapter IV, it has only become a serious part of the European legal system since the start of the millennium.

The successful history of antitrust regulation and private enforcement in the United States can be attributed to its policy towards civil claims. In the United States, private enforcement is in fact seen as a welcome instrument, not only to compensate victims of the infringement, but also to punish infringers and to function as a deterrent instrument. Within Europe, the public role of the governments and competition authorities, especially regarding deterrence and punishment is most important. Private enforcement is clearly in second place.

The successful history of antitrust regulation and private enforcement in the United States can also be attributed to the legislation, at least partly. The private enforcement system provides special benefits for victims and leniency applicants. In addition to the fact that a claimant can be awarded three times the damages, the claimant can focus on litigating against one cartel infringer for the complete damages, and it can also rather easily receive adequate compensation for the attorney fees. In Germany and the Netherlands it is, except in cases involving IP issues, common to be awarded only a small portion of the attorney fees.

It also appears that the civil procedural rules are helping claimants in the United States more so than in Germany and the Netherlands. For example, the United States is known for the possibility of filing suit as a class. This can make it interesting to file a suit on behalf of a group even when the damage suffered by each victim is limited. For victims in Europe, this appears to be more difficult. Some European countries do have some kind of class action options; others do not. Regarding the disclosure of information in the United States, it is particularly interesting that leniency applicants have to provide information to claimants in antitrust damages actions in return for a limitation of the damages to be compensated. Since the introduction of ACPERA, apparently more leniency applications have been filed which the competition authority was not aware of. In addition — and it is even more obvious — ACPERA appears to assist claimants in receiving compensation. In Europe, such a system is unknown.

1258. Hammond & Barnett 2008, para 2.
1259. Ibid.

In the United States, the passing-on defense is not possible at federal level, which makes litigating more straightforward for direct victims. A direct victim can claim all the overcharges. At federal level, indirect victims of a cartel are not able to claim damages because it would jeopardize the effectiveness and ease of claiming for damages. In Germany and the Netherlands, deterrence and ease of filing a lawsuit are unknown arguments to justify the prohibition of the passing-on defense. Although the CJEU holds that obtaining compensation should be effective, this is not limited to claims for direct victims. In Europe, compensating all victims of a competition-law infringement is the highest priority. The disadvantage of the US system could well be that direct victims do not want to sue their supplier. To them, it may be more important to maintain a good relationship with the supplier. Furthermore, a direct purchaser does not always suffer a loss because it is often able to pass-on the overcharge. Another difficulty in the United States exists because of the *Illinois Brick* repealer statutes. They make it possible for indirect claimants also to claim damages. In fact, the multiplicity of claim options at the federal and state levels, along with the various regimes, makes the American system complex.

Up until 1991, the United States was the only country in the world that had a leniency policy. It is interesting that in the United States, unlike in Europe, only the first applicant receives immunity from fines and there is no reduction for any other applicant. In addition, an important part of American public law enforcement is the jail sentences for cartel infringers. The US leniency system also prevents executives from going to jail. As mentioned in the GAO report, avoiding a prison sentence is one of the main factors in applying for leniency, besides avoiding high corporate fines. Although jail sentences are possible in some Member States, especially regarding bid rigging, prison sentences comparable to those ordered in the United States are unknown in Germany and the Netherlands. Therefore, this extra incentive that encourages undertakings to apply for leniency in the United States does not exist in Germany and the Netherlands. In the United States, the aim of avoiding prison time appears to be an important factor in the decision whether to apply for leniency. It means that undertakings will make a different cost-benefit analysis for the United States than for Germany and the Netherlands.[1260]

Another difference between the European systems discussed in this study and the US system is that in the Unites States a leniency applicant is required to compensate its direct victims. In Europe, such an obligation does not exist. In some countries, there is a possibility of receiving a lower fine from the competition authority if the cartel infringer compensates the victims of the infringement. If the fine is already zero because of full immunity, there appears little incentive for a leniency applicant with immunity to compensate the cartel victims. However, for the other cartel infringers, it could be worthwhile in order to receive a lower fine.

Another benefit for an immunity recipient in the United States is that the damages are de-trebled and the leniency applicant, if it cooperates with the victims of the cartel that claim for damages, is only liable for the damages attributable to it. The leniency applicant is exempted from the standard rule of joint and several liability,

1260. See Section 2.2.3.1.

which remains applicable for all other cartel infringers. It provides an additional incentive to apply for leniency in the United States, along with avoiding possible prison sentences and fines. Although the precise effect of the compensation benefits is hard to determine, there does appear to be some positive effect on the effectiveness of the leniency programme.

In Europe, where the negative side effects of private enforcement for the leniency policy are just partly removed and private enforcement is growing, it is likely that private enforcement actions will have negative consequences on the effectiveness of the leniency programme because of the damages that will most likely have to be paid. It could become less worthwhile to apply for leniency. Chapter 2 makes clear that damages claims are part of the overall consideration in deciding whether to apply for leniency or not. And as described, leniency is important. As seen in Chapter 4, the leniency programme is indirectly the starting point for much of the private enforcement cases that are pending.

With ACPERA, a leniency applicant in the United States also has an incentive to help a claimant by providing information in the subsequent litigation. This is a condition for reducing the compensation to be paid to the victims of the cartel. Where it is normally difficult to receive the information from cartel infringers, claimants in the United States receive help from an unexpected corner: one of the competition infringers. It becomes easier for victims of cartels to collect evidence and receive compensation.

The American approach is diametrically opposed to how information sharing and provision are discussed in the European Union. Whereas public and private enforcement are seen in the EU as two different enforcement routes, and information collected as part of the public enforcement process is seen as something that should be protected, in the United States the two systems are well intertwined. The public leniency process in fact helps to stimulate private enforcement.

In Europe, it is quite the opposite. The leniency applicant is protected to some extent in order to prevent disclosure of leniency information. The result is that it is more difficult for claimants to successfully claim damages. The case law shows that it is the leniency applicant who creates the momentum for starting private enforcement actions. The consequences of the European system are twofold: claimants are frustrated in their search for evidence and the protection offered to a leniency applicant is seen as a sham, as the claimants will claim damages regardless.

5.7 Conclusions

In contrast to Europe, the United States private enforcement is dominant in fighting cartels. The reasons can be found in the US history of lacking effective public enforcement and favorable instruments available to claimants in civil procedure: the ability to claim treble damages, the right to compensation for attorney fees, the possibility of class actions and the availability of far-reaching disclosure provisions. Furthermore, the help of an insider — a leniency applicant with immunity — appears to be a valuable tool for a claimant seeking to claim damages successfully.

The US system has multiple purposes: compensation, deterrence and punishment, and also aims at being straightforward for claimants. From that perspective, it is comprehensible that only direct victims can claim damages. Rather straightforwardly, a direct victim can claim compensation for an overcharge even if the direct victim passed-on part of the cartel overcharge to others. With the introduction of the *Illinois Brick* repealer statutes by many states, however, the intended simplicity of the direct purchaser rule is largely eliminated. The fact that indirect victims can still claim damages in state courts creates a complicated situation, which is exactly what the Supreme Court wanted to avoid. An obvious criticism of the direct purchaser rule is that it precludes indirect victims from being compensated. This seems inexplicably unjust, for one of the basic legal principles is that any injured party is entitled to compensation. Moreover, it could lead to overcompensation. In Europe, although it makes the litigation process more complicated, any injured party is entitled to damages, including indirect victims. It is the essence of what the litigation systems in Germany and the Netherlands are all about: ensuring a wrongful act will not result in a victim being worse off. In these countries, claiming for damages is not meant to serve as a deterrent, nor are litigants meant to serve as enforcers.

Concerning competition law enforcement, the United States clearly sees competition law enforcement as a complete system that includes criminal law, administrative law and civil law. In the United States, the system has a number of checks and balances, and it is the court that sets the penalization. This is in contrast to what occurs in Europe.

In Europe, public enforcement remains of utmost importance. It is common practice to protect a leniency applicant from having its information disclosed to litigants. Instead of a system where the various elements complement each other, in Europe the litigation system and the public law enforcement system work in fact against each other. The protection of a leniency applicant's information from disclosure during the litigation process does not help the claimant, nor does it provide safety for the leniency applicant either. The decision of a competition authority could in itself already be sufficient grounds for suing a leniency applicant. In fact, in Europe the leniency applicant has often been one of the first to be sued, as it was considered a relatively easy victim. It already confessed its involvement in the cartel (which is made clear in the decision of the competition authority) and often the decision of the competition authority is final for the leniency applicant with immunity but not for the other cartel infringers.

Protecting the confidentiality of information and not providing additional incentives for a leniency applicant in the private enforcement area could undermine effective competition law enforcement in the following three ways. First, cartel infringers may be less interested in applying for leniency because they risk several damages actions. Second, as a result, cartel victims may not become aware of the cartel and therefore may not be able to claim damages as long as cartel infringers refuse to apply for leniency. Third, claimants may have difficulties in collecting evidence for their claims because information is protected.

Providing incentives in both areas of law, as done in the United States, has the following advantages. First, there are more incentives for leniency applicants to apply for leniency. Second, as a result, more actions could follow and more victims could be compensated. Third, victims would be assisted in claiming damages which could, as seen in the United States, even lead to more settlements.

In Europe, the benefit of such a system may even be greater because incarceration, unlike in the United States, is not an incentive for applying for leniency. Whereas in the United States the main reasons to apply for leniency are the threat of incarceration and fines, and to a lesser extent a likely reduction in the amount awarded in private litigation, in Germany and the Netherlands the main reason to apply for leniency is the threat of fines. In Europe, if private claims against a leniency applicant can be prevented or reduced, it is conceivable that this would be an extra incentive to apply for leniency. It might even have a greater effect than in the US because the incarceration does not play the important role. This would possibly result in more leniency applications, more victims being aware of being victim of a cartel, and more victims being compensated for the loss suffered by cartel infringements.

Chapter 6

Synopsis

6.1 Introduction

Chapters 1 to 4 provide a broad overview of the competition law and leniency systems within Europe and the state of the private enforcement systems in both Germany and the Netherlands. Chapter 5 describes the systems of leniency and private enforcement in the United States and the main similarities and differences between these and the previously analyzed European systems.

In this chapter, the most significant potential weaknesses and inefficiencies of the European systems are set out, highlighting the bottlenecks and those areas where improvements could be made, as well as the ways in which these improvements could be achieved. In doing this, the solutions provided by the Antitrust Damages Directive and by the system in the United States are examined and analyzed. Further ideas as to how competition law enforcement could be made even more effective are then discussed.

Chapter 6 starts by summarizing the main findings of the previous chapters and focuses on the bottlenecks and solutions in order to take a step forward.

6.2 Main Findings

Consumers benefit when prices are set at an equilibrium in the levels of supply and demand. A cartel results in a surplus to one of the parties, often the supplier, and is therefore considered harmful to consumer interests.[1261]

One of the main characteristics of a cartel is that it is concealed from the public.[1262] The severe penalties and negative consequences for the undertakings and private persons involved in a cartel leads to the situation of cartel infringers doing their utmost to keep the cartel hidden. Therefore, it is often difficult to detect the existence of a cartel.

1261. See Section 2.2.
1262. See *inter alia* Section 2.1.

As seen in Chapter 2, an effective leniency policy is often required to detect a cartel.[1263] At the European level, nearly 80 percent of cartel investigations result from, or are assisted by, a leniency application.[1264] Even if a cartel has already been detected, a 100 percent fine reduction is still commonly provided. This reflects the fact that even if a leniency application did not lead to the detection of a cartel, the leniency applicant's assistance is still considered important in proving the existence of the cartel infringement.[1265]

A consequence of leniency is that at least one of the infringers (i.e. the party revealing the existence of the cartel and applying for leniency) will not be punished, or rather will be punished only to a limited extent for the infringement. The general reasoning behind leniency is that protecting consumer welfare and terminating a cartel's infringement with the help of a leniency applicant is more important than fining the individual infringing offender.[1266]

Several economists have done extensive research on how to make antitrust enforcement more effective.[1267] Economists often start with the objective of antitrust law. When is the law enforcement effective? The general conclusion is that the main objective of antitrust law enforcement against cartels is to prevent infringement.[1268] The assumption is that deterrence acts generally on a much larger number of potential infringements.[1269] Society enjoys larger savings in prosecution costs.[1270] Therefore, Spagnolo for example concludes that deterrence is and must be the primary objective of law enforcement and the foremost criterion for the evaluation of its optimality and efficiency.[1271] Several of these economists have designed experiments and models to analyze the general deterrence and price effects of different antitrust policies.[1272] The overall conclusion is that schemes granting leniency to the first wrongdoer who informs about the cartel and the other infringers, strongly increases deterrence and therefore the effectiveness of competition law enforcement.[1273] Hence, leniency applicants are really important. Indirectly, the leniency applicant appears to play a very significant role in antitrust damages cases as well. In most cases, a damages action against a cartel infringer in the civil courts follows once public enforcement action has begun.[1274] It can be concluded that, in both public enforcement action commencing with a leniency application and in those cases where the competition authority is assisted in its investigation by one of the

1263. See Sections 2.1 and 2.8.
1264. See Section 2.3.5.
1265. See Sections 2.2.1.2 and 2.8.
1266. See Sections 2.2.1.1 and 2.3.1.
1267. See *inter alia* Buccirossi, Marvão & Spagnolo 2015; Bigoni, Fridolfsson, Le Coq & Spagnolo 2015; Marvão & Spagnolo 2014; Bigoni, Fridolfsson, Le Coq & Spagnolo 2012; Silbye 2011; Harrington 2008; Spagnolo 2008; Spagnolo 2005.
1268. Spagnolo 2005, p. 7.
1269. See Section 2.2.2.3.
1270. Spagnolo 2008, pp. 264-265.
1271. Ibid, pp. 264-265.
1272. Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, p. 369.
1273. Ibid.
1274. See Sections 4.2.2.1 and 4.3.2.1.

cartel infringers, the leniency application has an intrinsic value to the effectiveness of private damages actions.[1275]

In the normal sequence of events, the leniency applicant informs the competition authority about the cartel's existence, after which the competition authority then begins an investigation and eventually makes a decision whether to fine the undertakings involved or the competition authority already suspected the cartel and the leniency applicant then assists it in proving the cartel's infringement. In both situations the leniency applicant assists claimants in subsequent private enforcement actions because the public enforcement procedure will then be used in the private enforcement case. An effective leniency policy leads to effective public enforcement and, indirectly, to the possibility of victims being able to claim damages and receiving compensation.[1276]

The facts show that in the current system of Germany and the Netherlands, an effective leniency policy is necessary in practice to obtain damages. Even if there is a suspicion, it often appears difficult to gather information from offenders and prove the offence in civil cases.[1277] In the United States, more far-reaching instruments are available to collect information from other parties. It is probably for this reason, next to the historical background and financial benefits of claiming damages and procedural assistance from the legislator, that private enforcement is not just the consequence of public enforcement, but also has its own important independent meaning for competition law enforcement.

As previously seen, a more productive leniency policy can be achieved in two ways. As discussed in Chapter 2, in order for a leniency policy to function properly, it is essential for it to be established and executed in a clear, predicable and transparent way, with all undertakings being treated equally.[1278] The leniency policy and competition authority must be sufficiently "trusted" by the leniency applicant for them to make a well-considered decision about whether or not to apply for leniency. Secondly, leniency should be beneficial from a cost-benefit perspective.[1279] There must be sufficient incentive to apply for leniency.

During the last few decades, competition authorities and policymakers in Europe have put a lot of effort into making leniency policy more effective.[1280]

Equality, predictability, transparency and certainty
Competition authorities and policymakers have put a great deal of effort into making leniency policy clearer, more predictable and transparent, and also into ensuring that all undertakings are treated equally.[1281] For example, competition authorities introduced a marker system for leniency applicants, which has the effect

1275. See Sections 4.2.2.1 and 4.3.2.1.
1276. Ibid.
1277. See Sections 3.3.2.4, 4.2.3.3 and 4.3.3.3.
1278. See Section 2.2.3.2.
1279. See Section 2.2.3.1.
1280. See Sections 2.2.3.1, 2.3.1, 2.3.5, 2.3.6, 2.4.4, 2.4.5 and 2.5.5.
1281. See Section 2.2.3.2.

of securing their place in the line, thus providing greater certainty in receiving immunity or a reduction.[1282] In addition to this, amendments to the leniency policy text have made the level of fine reduction clearer, thus providing possible leniency applicants with greater clarity as to what they can expect from a leniency application. Furthermore, the different competition authorities within the EU have tried to align their leniency policies. By removing discrepancies from individual leniency programmes and introducing the short form, competition authorities have removed some of the unpredictability and ambiguity, with the aim of making it easier to apply for leniency and, as a result of this, making leniency policy more effective.[1283]

It is virtually impossible to identify exactly which of these changes has made these leniency policies more effective. However, it is obvious that the number of leniency applications has substantially increased in the past few decades.[1284] These adjustments combined, have resulted in many more leniency applications being submitted, both at the EU level and in Germany and the Netherlands. This has, in turn, led to both the detection and fining of many more cartels.

Cost-benefit analysis
Policymakers have also increased the penalties for infringers, whilst simultaneously increasing the benefits for leniency applicants. Hence, policymakers created "bigger sticks and sweeter carrots".[1285] The fines for infringing undertakings have been raised, and in both Germany and the Netherlands natural persons involved in a cartel can be fined now too.[1286] Furthermore, the level of reduction in fines has been increased to up to 100 percent of the fine.[1287] This number creates a gap between the treatment of the leniency applicant, especially the applicant with immunity, and that of the other infringing undertakings. It makes it even more advantageous to be the first to apply for leniency.

6.3 Bottlenecks

6.3.1 Introduction

Whilst the effectiveness of the leniency policies of the EU, Germany and the Netherlands have improved tremendously, there are still elements of the leniency policy and of overall competition law that could be improved.

6.3.2 The Unpredictability of Policy Rules

Chapter 2 explains how the leniency system is laid down in policy rules. These guidelines for national authorities are established without direct democratic control and do not bind authorities directly towards third parties. If a competition authority does not act in accordance with the policy rules, a party should argue

1282. See Sections 2.3.4.4, 2.4.3.3 and 2.5.3.4.
1283. See Sections 2.6, 2.7 and 2.8.
1284. See *inter alia* Sections 2.2.3.1 and 2.3.6.
1285. *Cf.* Harrison & Bell 2006.
1286. See Sections 2.3.1, 2.4.5 and 2.5.5.
1287. See *inter alia* Sections 2.2.3.1 and 2.3.6.

that the authority is violating the principles of sound administration. In some situations, the authorities are allowed, at least to some extent, to deviate from those policy rules. Moreover, policy rules can be implemented quickly and adjusted without democratic approval. Additionally, the courts are not bound by them. All of these circumstances create a degree of uncertainty.[1288] This unpredictability is further exacerbated if policy rules provide competition authorities with broad discretion in the setting of fines and have a certain amount of freedom to reduce the fines. It is particularly the latter that makes the exact advantages of applying for leniency somewhat uncertain.[1289]

6.3.3 Independent Decision Makers

The European Commission has different roles. It develops legislation and edits policy rules, investigates infringements and sets fines. There is no complete independency for those who have to impose the fines. In the Netherlands, decision makers are under the direct control of executives who are also responsible for the investigations. These executives even have fine level targets to meet. The undertakings involved could question whether the fine and the fine reductions are sufficiently predictable, transparent and certain.

6.3.4 Differences Between the Leniency Policies

Another area that creates ambiguity, unpredictability and inequality, as well as hindering transparency, is the differences between the leniency policies of the various Member States.[1290] The European Commission only provides markers to the first leniency applicant, whereas in the Netherlands and Germany other leniency applicants can also receive a marker. Also, fine reductions can differ from Member State to Member State. Whether the European Commission or a national competition authority deals with a case could make a huge difference to the fine amount. In theory, a leniency applicant who is in fourth place could receive a reduction of up to 50 percent of the fine in Germany, whereas an applicant to the European Commission or the Netherlands could only expect a reduction of 20 percent or less.[1291]

As discussed in Chapter 2, differences in leniency policies also make it more expensive and time consuming when applying for leniency. A special analysis of every competition authority's leniency policy is often required to decide whether or not to apply for leniency.[1292]

6.3.5 Multiple Filing

Not only do the rules of different competition authorities differ from one another, but as was seen in Chapter 2, it could also be uncertain as to which competition authority will actually handle a specific case. This results in further ambiguity for

1288. See Sections 2.3.5, 2.3.6 and 2.7.
1289. Ibid.
1290. See Sections 2.7.2 and 2.8.
1291. See Section 2.7.2.
1292. Ibid.

leniency applicants.[1293] Leniency applicants do not always know exactly where to secure their position in the leniency line. To make sure that a cartel infringer applies for leniency correctly, it must apply for leniency with all the competition authorities that could potentially handle the case. This is inefficient, particularly when different authorities can raise questions and require supply of information at the same time.[1294] Such a procedure is also very time-consuming. Moreover, it is inefficient, as it then remains uncertain as to whether these differing competition authorities will actually ever act on the requested information.

6.3.6 (An Upcoming) Private Enforcement

Private enforcement of competition law in the civil courts has existed for a relatively long time in both Germany and the Netherlands, but it has not often been used in order to claim damages in cartel cases, until recently. The cases of *Courage v Crehan* and *Manfredi* helped to create awareness of the existence of this tool to claim for damages. The efforts of the European Commission in its Green Paper and White Paper, the Antitrust Damages Directive and other publications have also broadened this awareness.[1295]

In response to European developments, Germany introduced a special private enforcement framework relatively early, even prior to the adoption of the Antitrust Damages Directive. The special provisions assisted parties to claim damages. In the Netherlands, lawmakers have not provided the same certainty and assistance. This certainty and clarity had to come, instead, from the case law of the Dutch civil courts.[1296] In the beginning of 2017, the Dutch legislator implemented the provisions of the Antitrust Damages Directive into Dutch legislation. Since June 2017, the German legislation was also adjusted.

These days, in Germany and the Netherlands, almost all private enforcement cases relating to cartel victims claiming damages are so-called "follow-on cases". These cases almost always start with a leniency application, after which a public enforcement case is initiated. The publicity surrounding the public enforcement case, often resulting from the publication of a decision by the competition authority, gives rise to private enforcement actions.

US lawmakers have correctly pointed out that the connection between public and private enforcement is close.[1297] As discussed in Sections 2.2.3.1 and 3.3.2.2, public and private enforcement are closely intertwined, *inter alia* due to the existence of the leniency programme. In most cases, leniency is needed for the detection of cartels. Therefore, a leniency applicant plays a vital role regarding private enforce-

1293. See Sections 2.6.5 and 2.8.
1294. Ibid.
1295. See Sections 4.2.1, 4.3.2.1 and 4.3.4.
1296. See Section 4.3.2.2.
1297. See Section 5.5.3.

ment.[1298] The applicant makes people aware of the existence of the cartel and factually forms the basis for starting a private damages action.[1299]

Stand-alone cases regarding cartel infringements are uncommon in Germany and the Netherlands. In these countries, the resistance to fishing expeditions and punitive damages is gargantuan.[1300] However, without the possibility of starting fishing expeditions with extensive discovery rights and attractive financial provisions for claimants (as is the case in the United States), stand-alone damages actions remain scarce, and public and private enforcement cannot be considered equal to one another. As long as such far-reaching discovery rights remain unknown and the Antitrust Damages Directive does not steer Europe in that direction, then public enforcement, with its leniency policy, will remain the driving force in competition law enforcement. Private enforcement in cartel cases is, and will remain, the last enforcement step to undo the illegality by compensating the victims of the cartel infringement.

The CJEU has noted that an upcoming private enforcement system, with damages to be paid by leniency applicants, including paid by the immunity recipient, could influence the effectiveness of the leniency programme.[1301] This is what several scholars also conclude. Several economists, based on economic research including experiments and economic models, conclude that an upcoming private action may indeed jeopardize the effectiveness of leniency policies, resulting in less effective overall competition law enforcement.[1302]

This conclusion is congruent with the observations about the cost benefit analysis as discussed in Sections 2.2.3.1 and 3.3.2.2. Because the effectiveness of a leniency programme largely depends on its benefits to the leniency applicant, all the relevant disadvantages that come from applying for leniency must be considered. If elements exist, or develop, that could make leniency less interesting, then a solution could help to prevent the effectiveness of the leniency policy from being jeopardized.[1303] Applying for leniency would most likely lead to future private actions, which though not a punitive fine, would certainly hurt the undertaking, as they would have a negative influence on its financial performance. The same is true for other additional costs, such as for legal assistance and advice, as well as those for the cost of lawsuits and possible use of experts. With an upcoming private enforcement, it is more likely that damages will have to be paid, at least in part, to the victims of the competition law infringement. These damages could be very substantial if the private enforcement system works properly and could be even more substantial than the fine of the competition authorities, even in Europe where the fines are astronomical.[1304]

1298. See Sections 4.2.2.1 and 4.3.2.1.
1299. See Section 6.3.
1300. See *inter alia* Netherlands Ministry of Economic Affairs 2006, pp. 2 and 4.
1301. CJEU 6 June 2013 (*Bundeswettbewerbsbehörde v Donau Chemie et al.*), point 42; CJEU 14 June 2011 (*Pfleiderer AG v BkartA*), points 26-32.
1302. Buccirossi, Marvão & Spagnolo 2015, p. 2; Silbye 2011, p. 692.
1303. See Section 2.2.3.1.
1304. See Section 3.3.2.2.

The negative aspect of more private enforcement is even stronger, if the leniency applicant appears to be an extra worthwhile party to sue. Prior to the Antitrust Damages Directive, in Germany, as well as in the Netherlands, all cartel infringers were jointly and severally liable.[1305] The victim(s) could have decided to sue only one party — for example, the leniency applicant for the overall damage. The main advantage of suing the leniency applicant is that it will have already confessed to the existence of, and its participation in, the cartel. In such circumstances, the burden of proof can more easily be met for the claimants. This can therefore be considered a drawback of applying for leniency.

In European cases, a related negative consequence relates to the "Masterfoods" defense. A leniency applicant granted immunity is no longer obliged to pay a fine, meaning that the applicant then has no reason to apply for judicial review of the competition authorities' decision. However, the other cartel infringers will almost always do so. This implies that the decision for the leniency applicant with immunity could be final and irrevocable, whilst the decision for the other cartel infringers is not. Because the decision for the other cartel infringers remains revocable, national courts are prevented from taking decisions that could possibly oppose that of the European Commission.[1306] This could lead to a situation where proceedings for the leniency applicant could go on, but remain on hold for the other infringers. Because the cartel infringers are jointly and severally liable, claimants could then focus solely on the leniency applicant and go on with the procedure. For claimants, this could be an additional argument to focus on the leniency applicant.

Potential claimants can delay starting a procedure and create all kind of costs until the decision of the competition authority has become final and irrevocable and certainty about the infringement exists. However, if the decision against the leniency applicant is final and irrevocable, but for the others it is not, it could imply that if a claimant decides to sue a leniency applicant, that claimant must sue the leniency applicant prior to the other infringing parties to prevent claims being time barred. It can be assumed that victims would like to secure their claim against the leniency applicant and prevent the claim from being time-barred.

6.4 Steps Forward and Solutions

6.4.1 Introduction

This Section discusses possibilities to improve the effectiveness of leniency in order to improve the effectiveness of overall competition law. Firstly, the provisions of the Antitrust Damages Directive that influence leniency policy are summarized below. Then the European, German and Dutch leniency systems are compared with that in the United States, including by examining the characteristics of the Amer-

1305. See Sections 4.2.3.2 and 4.3.3.2.
1306. See Sections 4.2.3.7 and 4.3.3.7.

ican leniency programme. Finally, additional alternative solutions that could make leniency policy more effective are discussed.

6.4.2 The Antitrust Damages Directive and Leniency

6.4.2.1 *Introduction*

As discussed in Section 6.4.2, the Antitrust Damages Directive includes several provisions that make leniency policy more effective. However, the Antitrust Damages Directive pays no attention to enhancing the leniency policy's effectiveness by improving its clarity and predictability or by securing the principles of equality and transparency in the policy itself.

The Enforcement Directive Proposal could, if it would be accepted, provide more guidance.[1307] Although it is likely that the Member States will keep their policy rules, the policy rules can no longer be adjusted that easily. They have to remain in accordance with the Enforcement Directive. It provides more clarity and predictability and secures the principles of equality and transparency. Unfortunately, the other mentioned shortcomings are not resolved with the Proposal. The leniency provisions of the proposed Enforcement Directive are in fact merely a copy of the ECN Model Leniency Programme, which leaves much freedom to the Member States.

Although the Antitrust Damages Directive does not provide clarity, predictability or secures the principles of equality and transparency of the leniency policy itself, one of the main aims of the Antitrust Damages Directive is to maintain effective public enforcement by securing an attractive and a productive leniency policy.[1308] It does this by protecting the leniency applicant against private claims to some extent.[1309] It protects specific information, and partly removes joint and several liability. This then makes the immunity recipient only jointly and severally liable towards its own direct or indirect purchasers and providers and towards others if no full compensation could be received from the other infringers.

6.4.2.2 *Protection of Information of the Leniency Applicant*

The Antitrust Damages Directive protects the leniency applicant by protecting the leniency statement and some additional documents from disclosure until after the competition authority has closed its investigation.[1310]

As discussed in Section 6.3, the Antitrust Damages Directive provides some protection but ignores the fact that the investigation and decision by the competition authorities, as well as other information provided to the public, could already provide an incentive for claimants to claim damages. It can, therefore, be assumed that the provisions in the Antitrust Damages Directive do not protect the leniency applicant from the adverse effects of applying for leniency. In fact, by applying for

1307. See Section 2.6.5.
1308. See Section 3.3.2.2.
1309. See Sections 3.3.2.4 and 3.3.2.7.
1310. See Section 3.3.2.4.

leniency, more claims can be expected because the cartel becomes known to the outside world, including to the victims that will possibly claim damages. The main effects of the provisions regarding the protection of information are the protection of the leniency statement and the protection of the investigation.

6.4.2.2.1 Protection of Investigation

Point 4.2 of the preamble of the Antitrust Damages Directive states that whilst an investigation is going on, disclosure could hinder public enforcement proceedings. Disclosure could reveal what information is in the file of a competition authority and could therefore be used to unravel the authority's investigation strategy. The aim is not to hamper the public enforcement procedure.

6.4.2.2.2 Protection of Leniency Statement

The Antitrust Damages Directive makes clear that the leniency statement that is specially prepared by the leniency applicant for the purposes of the application and that describes the undertaking's or natural person's knowledge of, and role in, the cartel cannot be used as extra evidence against the leniency applicant once protected by immunity.

The aim of the Antitrust Damages Directive is to protect the leniency applicant from being in a worse position than its cartel co-infringers. It assumes that a leniency applicant assesses only whether it is in a worse position than its co-infringers. For the effectiveness of the leniency policy however, it is relevant for the leniency applicant whether applying for leniency implies that private actions are to be expected.[1311] The protection of the leniency statement does not change that. In actual fact, the provisions intended to protect a leniency applicant's information do not save the applicant completely from the negative consequences of applying for leniency.
From the leniency application and the competition authority's public enforcement actions, the cartel will become public knowledge. Dozens of recent cases have shown that this then appears to be sufficient reason for claimants to commence litigation for damages.[1312]

Moreover, this provision protecting the leniency applicant from disclosure of the information does not protect the applicant from disclosure of the information that already existed prior to the leniency application. It is even uncertain whether the corporate statement can be protected per se, or whether a case-by-case analysis is necessary, as explained by the CJEU. In addition, after the investigation of the competition authority, protected information from the grey list could still be claimed and used in civil proceedings.[1313] It could be argued that even more information may have to be provided by the leniency applicant after the implementation

1311. See Section 2.2.3.1.
1312. See Sections 4.2.2.1 and 4.3.2.1.
1313. See Section 3.3.2.4.

of the new Antitrust Damages Directive. This would make it less attractive to apply for leniency as it could lead to more successful claims.

At the same time, it is questionable whether the new provisions will assist claimants in collecting information and claiming for damages successfully. Information asymmetry between cartel infringers and claimants continues to exist. This is especially the case where the cartel is undetected by public enforcement officials. Claimants still have the obligation to present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.

Sections 4.2.2.1 and 4.3.2.1 have shown that in practice in Germany and the Netherlands, unlike in the United States, antitrust claims for damages are almost always follow-on cases based on public enforcement investigations, information and decisions. *Inter alia* because no far-reaching discovery rights have been introduced, the Antitrust Damages Directive will most likely not change much regarding the importance of public enforcement and information stemming away from that procedure, in relation to successful private enforcement.

6.4.2.3 *Partial Removal of Joint and Several Liability*

A second instrument created by European lawmakers to protect the leniency applicant, is limiting the liability of the immunity recipient.[1314] In principle the immunity recipient is relieved from joint and several liability for the entire harm and any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. The immunity recipient remains fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.[1315]

At first sight, this sounds like it makes a huge financial difference in comparison to the existing situation where all parties are jointly and severally liable. However, in Germany and the Netherlands jointly and severally liable parties under normal circumstances ultimately contribute the amount that they are responsible for. That is to say that they do contribute for their relative part of the damage. In most cases, it is therefore not immediately likely that a lot will change regarding the contribution. Moreover, it should be noted that in practice the group of direct or indirect purchasers or providers of the immunity recipient as mentioned in Article 11 (4) of the Antitrust Damages Directive could be a substantial group still. Only selling

1314. See Sections 3.3.2.7 and 3.4.3.
1315. See Section 3.3.2.7.

one product once to a purchaser appears sufficient for the purchaser to claim full compensation, including from the immunity recipient.

This new provision however does provide a few important benefits for the immunity recipient. First of all, the immunity recipient can be sued by its direct or indirect purchasers and providers. For other direct and indirect purchasers and providers it is only liable if compensation cannot be received from the other infringers. With regard to third parties, the immunity recipient has a contribution obligation to other infringers to pay damages for its relative share of the damage. It means that its potential exposure is, especially in first instance, more limited. Secondly, it makes the leniency applicant less attractive to cartel victims as the target of the litigation, as only a relative share of the damages can be recovered from the immunity recipient.[1316] This could certainly be considered an advantage for the immunity recipient. As discussed above, the immunity recipient was often an attractive party to sue, as it was jointly and severally liable and it had confessed to the cartel and the decision was often already final because it had not appealed. This provision could prevent a leniency applicant from being required to litigate first, and from first bearing the risk that damages cannot be recovered from the other infringers. It also prevents the situation in which the immunity recipient needs to pre-finance all the damages and sue or implead the other infringers. In addition to the cost-benefit advantages for the immunity recipient of both advantages described above, the limitation of liability will also provide more certainty and clarity about the amount of damages that could be expected if applying for leniency.

It should be noted that the immunity recipient could still be an attractive party to sue because of other considerations. In international cartels claimants often first analyze in which country they would like to start the legal proceeding and then look at the parties they would like to sue. If the immunity recipient is incorporated in the Member State where the claimants want to start their proceedings, the immunity recipient probably remains an attractive party as an anchor defendant. One of the aims of the Antitrust Damages Directive, however, is to limit the differences between the Member States when it comes to antitrust damages actions. If this goal is achieved, it could be argued that this — potential negative — forum-shopping consequence for the immunity recipient will become less important.

6.4.3 United States Solutions

In the United States, an immunity recipient receives all the benefits, whereas the other cartel infringers are left empty-handed and severely punished, often with prison sentences. In Europe, subsequent leniency applicants receive reductions in different "bands". As there is no similar reduction for subsequent leniency applicants, the competition authority also has a more limited discretion.[1317] This makes the system more straightforward and less susceptible to discussions on clarity, predictability, transparency and equal treatment.

1316. Antitrust Damages Directive, preamble point 38.
1317. See Section 5.5.4.

In the United States, leniency policy and private enforcement are attuned, as leniency is also attractive in relation to private enforcement cases. In Europe, the system functions such that private enforcement is seen as a risk inherent in an effective leniency policy, whereas in the United States this risk is abated. In the United States, a leniency applicant receives an additional bonus in the private litigation if it cooperates with the victims of the cartel infringement. The immunity recipient, collaborating with claimants, is not jointly and severally liable for all damages and does not risk the payment of treble damages, as its risk is limited to single damages only.[1318] Instead of seeing private enforcement as a negative, risky consequence of applying for leniency, in the United States the leniency programme brings advantages with regard to the effectiveness of private damages claims. The leniency applicant has the certainty that its damages will be limited to single damages. This provides an extra incentive in applying for leniency and is a considerable advantage. It is an advantage that can also be taken into account in the cost-benefit analysis. Therefore, it could be expected to make leniency policy and overall competition law enforcement more effective.[1319] In addition to this, the difficulties regarding information that has to be collected are less evident for claimants. The leniency applicant is obliged to provide all the necessary information, which in turn makes the whole information process for claimants significantly easier.

6.4.4 Thoughts on Further Improvements of the Effectiveness of Competition Law Enforcement

6.4.4.1 *Introduction*

Based on the observations above, how can competition law enforcement be made even more effective? In this Section possible improvements are discussed.

6.4.4.2 *Binding Legislation*

At the moment, the rules for receiving leniency are set out in soft-law policy rules. Incorporating the leniency policy into legislation would be preferable in helping to make it even more effective, although this would likely be less practical for the competition authorities and policymakers. In general, it is more difficult to diverge from hard law than it is from policy rules. Moreover, hard law cannot be so easily changed and would also be subject to democratic approval.

It makes sense to implement leniency policy in hard law if leniency also starts to play a role in other binding legislation. Where, under certain circumstances, the positive consequences of applying for leniency are already provided for in binding law, why is the cause of these positive consequences — i.e. applying for leniency and receiving immunity — also not implemented in these provisions? For example, with the new Antitrust Damages Directive, the applicant with immunity has special privileges, including limitation of liability. As another example, in the Dutch Procurement Act, the immunity recipient has other advantages, such as still being

1318. See Section 5.5.3.
1319. Ibid.

able to join tenders, which will be more difficult for the other cartel infringers for at least several years.

It appears that the European Commission shares this view, at least to some extent. As described in Chapter 2, the European Commission recently spread a proposal for a new directive *inter alia* meant to adopt the leniency rules of the ECN Model Leniency Programme as the standard.[1320] Although it is likely that the Member States will keep their policy rules, the policy rules should be — if the Enforcement Directive will be accepted — in accordance with the Enforcement Directive and cannot be changed anymore that easily. They have to remain in accordance with the Enforcement Directive.

6.4.4.3 *Independent Decision Makers*

As it is already the case in the German system, it would be preferable if the decision makers setting the fine were completely independent from the investigating officials, executives and policymakers. For undertakings, this could provide additional trust regarding the competition authorities' activities and the exact fines (including any reductions) set by the competition authority.[1321]

The German solution, which is to protect decision-making officials with a "judge" status appointed for life, contributes to this independent status. The decision makers are not, or are only to a limited extent, dependent on others like executives of the competition authority and policymakers. This creates certainty for undertakings that are willing to apply for leniency. They will sooner assume that the decision is taken solely on the merits of the legislation, policy rules and the case, and not under pressure from policymakers, executives or investigating officials.

6.4.4.4 *Fixed Reductions*

We have seen in both the United States and Europe that the certainty of full immunity and the removal of discretion from competition authorities leads to more leniency applications.[1322] However, competition authorities within Europe still have a wide margin to reduce fines for the second leniency applicant and other later leniency applicants. This results in uncertainty, which could negatively affect the effectiveness of the leniency programme and hence the competition authorities' public enforcement task.

A competition authority should be prevented from misusing, or being expected to misuse, its discretionary power by providing a lower reduction. By making these elements crystal clear, the leniency policy would be considered more predictable and transparent and would provide more safeguards for the equal treatment of undertakings. All of these ingredients could help to create an even more effective leniency policy.[1323]

1320. See Enforcement Directive, chapter VI. See also Section 2.6.5.
1321. See Sections 2.4.2 and 2.4.5.
1322. See *inter alia* Sections 2.3.1, 2.4.5, 2.5.1, 2.5.5 and 5.2.
1323. See Section 2.2.3.2.

To prevent ambiguity about the actual reduction, the reduction should be a binary consideration. If the place in the line is clear, then the following questions remain: is the additional information of value and did the undertaking fulfill all its obligations concerning leniency? If the answer to these questions is yes, then a fixed reduction should be provided.

6.4.4.5 *Fully Harmonized Policy*

Differences between Member States should also be removed. Until now, it has only been possible to harmonize the leniency policies of different Member States to a limited extent, using the recommendations and considerations of the ECN Model Leniency Programme.

By using exactly the same reductions and conditions, a fully harmonized policy would likely provide more clarity, predictability and certainty about whether the principles of equality and transparency have been taken into account. This would also be more cost-effective, as both the legal costs and the effort for leniency applicants would be reduced. Cartel infringers would no longer need to be advised on the policy in each Member State, as well as that of the European Commission. Rather, they could receive simplified, general advice.

Unfortunately, the proposed Enforcement Directive of the European Commission does not provide much more clarity, predictability and certainty. The leniency provisions of the proposed Enforcement Directive are in fact merely a copy of the ECN Model Leniency Programme which leaves much freedom to the Member States. The freedom implies that important differences still exist between the programmes of the different Member States, for example the exact reduction of the fine and parties who can receive a marker (only the immunity applicant or all applicants).

6.4.4.6 *One-stop Leniency Shop*

The current ECN Model Leniency Policy does not provide a "one-stop leniency shop".[1324] Predictability could be further enhanced by creating a system in which cross-border cartels could be dealt with by applying to a single authority.

The European Commission holds that leniency policies are a key tool for detecting cartels, and also holds that companies considering leniency need a sufficient degree of legal certainty to be incentivized to cooperate with authorities.[1325] Unfortunately however, the proposed Enforcement Directive does not provide a one-stop shop as instrument to provide an improved degree of legal certainty and being more straightforward and more cost-effective.

1324. See Section 2.6.5. See also CJEU 20 January 2016 (*DHL v Autorità Garante della Concorrenza e del Mercato*), with opinion of Advocat General Wathelet of 10 September 2015.
1325. European Commission 2017 (Proposal Enforcement Directive), pp. 3 and 5.

Currently, the cartel infringer has to apply for leniency in all Member States where there has been a possible cartel infringement, as well as with the European Commission. Furthermore, the leniency applicant could then receive questions from, and be obliged to provide information to, several different competition authorities at the same time. By dealing with the application for the whole of the EU in one place, there would be more certainty for the undertakings involved. With a one-stop shop, it would be up to the competition authorities to decide which would be the best authority or authorities to handle the case. A one-stop shop would make it easier, more straightforward and more cost-effective to apply for leniency.

If the Commission were to provide a marker (and not only for the immunity recipient but for all (successful) leniency applicants) that would also be applicable towards national competition authorities, then a one-stop shop would in fact be created. The leniency applicant would then have to apply for leniency only once and the competition authorities would decide which authority or authorities would handle the case. The undertaking's place in the queue would be secured in front of all competition authorities.

6.4.4.7 *Balancing the Leniency Policy and Private enforcement*

Disclosure of leniency information
It is often argued that a disadvantage for leniency applicants exists when information is disclosed from the competition authority's record. Protecting the corporate statement is considered a panacea. However, it should be reminded that the knowledge of a cartel decision of a competition authority often appears to be sufficient to bring about damages claims, even without special information from a leniency applicant. It means that the effectiveness of the leniency policy could already be jeopardized when the knowledge of the cartel becomes public. This happens when a competition authority makes a decision to start an investigation, sets a fine and publishes (information about) the decision. At the same time, in practice, claimants still face difficulties in collecting evidence. Although this does not appear to stop them from claiming damages in follow-on cases per se, it makes the procedure more complex, more time consuming, and more expensive.

Limiting liability immunity recipient
Under the Antitrust Damages Directive, a successful immunity recipient is in principle no longer jointly and severally liable to all victims but only towards its direct or indirect purchasers or providers and to other purchasers and providers to the extent they cannot receive the compensation from the other infringers. This could be considered an extra incentive to apply for leniency. However, in relation to the damages that have to be paid in the end the effect of this provision appears limited. The leniency applicant may assume that it still has to compensate for its share of the damage and maybe even more if the other infringers are not able to compensate the damage. The situation does only differ from what has been the situation prior to the introduction of the Antitrust Damages Directive to a limited extent. The main effect of the provision is that the immunity recipient is less appealing to sue at first instance.

Public Enforcement v Private Enforcement

It becomes clear that in Europe, public enforcement and private enforcement policies remain separate areas, whereas in the United States, policymakers have established a regime where the two are closely intertwined and cooperate. Unlike in the United States, a leniency applicant with immunity has no obligation to cooperate with victims in their pursuit of compensation from the other cartel infringers.

A system similar to that used in the United States, where the advantage in damages actions is incorporated into the system, would give immunity recipients an extra incentive to apply for leniency and would most likely make the leniency policy more effective. In addition to this, as has been shown in the United States, it would also make it easier for claimants to receive compensation and settle cases, as they are then assisted by one of the cartel infringers.[1326]

In this context, a reference could be made to conclusions of economic research. To optimize the attractiveness of the leniency programme and the antitrust aim of deterrence, Buccirossi, Marvão and Spagnolo allege that for a leniency programme to be optimal, the amount of damages the leniency applicant is liable for should be minimized and the share of information collected by the competition authority and made accessible to claimants should be maximized.[1327] Based on their economic models and experiments, it is clear that when liability risks for the immunity recipient decreases, cartel deterrence increases.[1328] They state that reducing the amount of information victims of cartels can access and use in private damages suits — as done in the EU solution as mentioned in the Antitrust Damages Directive — will never lead to maximal deterrence.[1329] In fact, the Antitrust Damages Directive creates difficulties for claimants to receive information, preventing claimants from successfully claiming full compensation. Buccirossi, Marvão and Spagnolo even conclude that claimants are worse off under the new Antitrust Damages Directive.[1330]

It is interesting that the antitrust regime in Hungary already contained the idea of providing protection for the immunity recipient in civil proceedings prior to the introduction of the Antitrust Damages Directive. The immunity recipient only had to compensate victims for the harm suffered as a result of the infringement if the other infringers were not able to compensate the victims.[1331] The Hungarian system could be considered a variant to the United States ACPERA rules. The Hungarian system has also removed a lot of the uncertainty for the whistle-blower. The immunity recipient had an extra incentive for blowing the whistle, and the protection granted to the immunity recipient did not prevent the access to the information

1326. See Section 5.5.3.
1327. Buccirossi, Marvão & Spagnolo 2015, p. 5. *Cf.* Renda *et al.* 2007, para 6.2.
1328. Buccirossi, Marvão & Spagnolo 2015, p. 14.
1329. Ibid.
1330. Ibid, p. 5.
1331. Ibid, p. 4.

and evidence to the competition authority.[1332] The aim was to protect the leniency programme, without preventing claimants from claiming for damages.

With the "Hungarian model", the claimants could be compensated fully, and are protected against payment problems if other cartelists (besides the immunity recipient) are not able to compensate for the harm caused by the cartel infringement. In such — almost theoretical — event, the immunity recipient could still be liable. Of course, this brings some uncertainty for the immunity recipient but ensures compensation for the harm caused by the infringement. In fact, it provides an extra guarantee that everyone who suffers from a competition law infringement should be indemnified.[1333]

It is worth noting that in the Green Paper of December 2005, the European Commission mentioned the idea of reducing the damages paid by the leniency applicant with immunity already, in order to make the leniency policy more effective.[1334] In the consultation round that followed, many parties gave their opinion about this suggested solution. Some parties, among almost all — if not all — Member States, were very much against this idea on the grounds that the public "immunity" should be separate from the civil law system. Moreover, a limitation of liability for a leniency applicant is undesirable as it could be considered as an undesirable extra bonus for a cartel offender.[1335] Others appeared less skeptical about this solution, including the Max Planck Institute.[1336] For whatever reason, most likely also because of the critical notes from the Member States, the Member States that still had to approve the Antitrust Damages Directive, the European Commission decided not to include this possible solution in the subsequent White Paper or in the Antitrust Damages Directive.

If, however, the intention of the Antitrust Damages Directive is, on one hand, to prevent a leniency policy from being jeopardized by more private enforcement and, on the other hand, to encourage victims of competition law infringements to claim for damages, the obvious solution is then to provide leniency applicants with an incentive to assist claimants with their antitrust damages actions with financial benefits in return.

The immunity recipient should not have to compensate for damage, or only a limited extent of the damage it normally has to compensate if it duly assists in the civil proceeding. This would be akin to the United States model. The final calculation of damages could be, for example, 50% of the damages it normally has to pay, based on its own sales or market share. The obligation to assist claimants should, like in the United States, be part of the conditions to apply for immunity success-

1332. Buccirossi, Marvão & Spagnolo 2015, p. 4.
1333. *Cf.* CJEU 20 September 2001 (*Courage Ltd v Bernard Crehan*), point 26; CJEU 13 July 2006 (*Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*), point 60 et seq; CJEU 5 June 2014 (*Kone AG and Others v ÖBB-Infrastruktur AG*), point 21.
1334. See Section 3.2.9.3.
1335. Ibid.
1336. Max Planck Institute 2006.

fully. The other infringers should remain jointly and severally liable for the complete harm and would have to compensate for the overall damage.

Like in the Hungarian variant, in the — rather theoretical — event that the other infringers are not able to compensate the victims, the immunity recipient should still be obliged to compensate the victims. This will often only be a theoretical option, as most of the time the other infringers are individually or collectively able to compensate for the complete harm. Such a clause provides more certainty that every victim can successfully claim for compensation. Moreover, this — theoretical — risk prevents immunity recipients from exaggerating the infringement and harm caused in order to hinder their competitors in the civil proceedings, as the risk of paying damages itself still lingers.

According to the mentioned economists, a complete deletion of the obligation to compensate would make the leniency programme most effective. Even if that would not be achievable, a reduction of the obligation to compensate also appears helpful, certainly for the claimants, as can be concluded from the experiences in the United States. Although some damages would still have to be paid, by providing a reduction in these damages there would be two extra incentives to apply for leniency first: firstly, as an "extra carrot", the damages that have to be paid would be reduced for the immunity recipient, and secondly, as an "extra stick", the extra damages would have to be paid by the other cartel infringers.

With a balanced system between leniency and private enforcement as described above, every victim would still be able to receive full compensation. Moreover, such a system creates an extra incentive for cartel infringers to apply for leniency.

Both solutions (hence the complete waiver or a reduction of the compensation obligation) would not be in violation of the case law of the CJEU, which has made clear that every victim of a competition law infringement should receive compensation and that an effective leniency policy should be secured to safeguard the public interest of effective competition. In fact, both of these goals will be achieved to the maximum extent.

This suggested system does not introduce punitive damages, nor does it result in overcompensation for claimants, which would be in conflict with Article 3(3) of the Antitrust Damages Directive. In the suggested system, only the real damage (cost, lost profit and interest) would actually be compensated. Moreover, it should be noted that the obligation to pay more than the relative share of the overall harm as individual infringer (what would be a consequence of the suggested system for the other infringers), is not new. It is already possible for an infringer to be required to compensate more than the share attributed to it. If one of the infringers is unable to compensate its part of the damages, other infringers are required to bear that part of the compensation as well, even if more than its relative part of the damages.

Granting a limitation of liability is, although uncommon, definitely defensible, as the leniency applicant would not only reveal the cartel, and stop further harm for the victims, but also provide support to the claimants in civil proceedings. In actual

fact, the leniency applicant with immunity is the one who makes it possible for claimants to receive compensation for the damage suffered. As a reminder, without the leniency application, victims would most likely have been unaware of the damage and would even have continued to bear this loss and damage for as long as the cartel existed.[1337] The suggested system could be compared with the rationale of the administrative system of fine reductions in relation to the leniency policy. In the Commission Notice on Immunity from Fines and Reduction of Fines, the European Commission alleges that detecting secret cartels is in the interests of both consumers and citizens. Detection outweighs the interest of fining those undertakings because otherwise there would be no enforcement activity at all. The same is true when it comes to compensation. The overall interest of stopping further harm and receiving full compensation outweighs the interest of claiming damages from the immunity recipient.

If a system is introduced where private and public enforcement go hand in hand, the United States system demonstrates that it is important for the policy to state clearly what cooperation is expected from the leniency applicant. Several US legal practitioners have noted that one of the weaknesses of the American system is that the exact nature of the cooperation obligation of the leniency applicant with immunity is too vague and results in uncertainty.[1338] The exact kind of cooperation should be framed and demarcated. For example, the leniency applicant should be obliged to provide its record as provided to the competition authority, to give its input on the causality between the unlawful act and the harm and give its input on the calculation of damages.

Masterfoods

Another identified hurdle for leniency applicants relates to the Masterfoods defense, where the decision for the leniency applicant has become irrevocable but the decision for the other cartel infringers has not. As stated in the preamble of the Antitrust Damages Directive the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings, making the immunity recipient potentially the preferential target of litigation.[1339]

A positive (side-)effect of (partly) removing joint and several liability for the immunity recipient, as stated in the Antitrust Damages Directive, is that the immunity recipient is less appealing to claimants. Under the alternative system just presented, the immunity recipient would become even less popular to sue, as the amount of compensation that could be claimed from the immunity recipient would be even more limited, and perhaps nil.

Limitation period

Furthermore, the special limitation period to assist claimants could be stipulated more in favor of the leniency applicants and the claimants. The Antitrust Damages

1337. See Sections 4.2.2.1 and 4.3.2.1.
1338. Hausfeld & Sweeney 2017, p. 9 et seq.
1339. Antitrust Damages Directive, Preamble point 38.

Directive does provide a solution for the limitation period for follow-on cases, but it is rather complex and can differ per infringer. For example, if a leniency applicant does not apply for judicial review, and other infringers do, then claimants will be able to, and may be obliged to (based on the limitation period), claim damages against leniency applicant earlier than the other cartel infringers that have applied for judicial review.

In Germany, Section 33h (8) ARC under 1 provides a particular rule for victims that cannot be considered as the direct and indirect purchasers or providers of the immunity recipient. It ensures that for such victims, the limitation period starts from the end of the year when it becomes clear that they cannot receive compensation from the other infringers. The advantage of this specific provision is that for such victims, there is no need to file suit against the immunity recipient rapidly, without knowing whether other infringers will compensate the damage just in order to prevent claims from being time-barred. It also means an advantage for the leniency applicant, as it could be expected that the immunity recipient will not be one of the most appealing parties to sue first. The disadvantage is that immunity recipients could entertain uncertainty for a long time about whether claims should still be expected. Consequently, the file cannot be closed for a long time.

It would probably be more straightforward if, for example, the limitation period was to end one year after the last decision regarding the cartel had become final and irrevocable, irrespective of how long the public procedure(s) took. That is to say, regardless of interruptions of the limitation period. This would give claimants sufficient time to claim damages after the decisions has become final and irrevocable. It would also provide defendants with the certainty that one year after the (last) public procedure closes, the cartel infringers are known with the possible antitrust damages claims. This could make it easier to settle to case.

6.5 Conclusions

One of the main difficulties with competition law is that so many aspects can influence its overall effectiveness. The introduction of criminal law sanctions or a rise in private enforcement could influence the leniency policy and, hence, the effectiveness of public enforcement. Protecting the information of the leniency applicant could also influence the effectiveness of antitrust damages actions.

It is important to find the right balance. That is, a balance between claimants being able to effectively claim damages and cartel infringers still having enough benefits to continue to apply for leniency, and public enforcement policy, therefore, remaining effective. This is imperative, because as this study shows, without leniency applicants there would be hardly any private enforcement in Germany and the Netherlands at all.

Even with the Antitrust Damages Directive, there is still ambiguity regarding the liability of entities, the fact that decisions of foreign competition authorities are not binding per se and how to calculate the relative share of the damage to be paid by each and every infringer and the fact that it remains difficult for claimants with

small claims to claim for damages collectively. However, the Antitrust Damages Directive is a serious step in the right direction, as it provides better instruments for the victims of competition law infringements to claim damages and a unified approach for the EU. There are several elements that could lead to more effective private enforcement: the presumption of damages in a cartel infringement, a provision for a special limitation period, the valuation of public enforcement decisions and verdicts, the strengthening of indirect victims' position and some unified rules on disclosure of information. The leniency applicant with immunity also has a better position towards claimants. This makes the leniency applicant less of an attractive litigation target.

However, the introduction of the Antitrust Damages Directive may also have a negative consequence for leniency applicants, because more claims could be expected and information, even relating to the leniency application, may have to be disclosed and more claims in general could be expected. This could make applying for leniency less attractive after a cost-benefit analysis, resulting in less effective public enforcement and having the side effect of victims remaining unaware of the infringement and, therefore, not being able to claim damages. At the same time, protecting the leniency statement and other information may make it more difficult to collect information about the cartel infringement for claimants. The provisions should lead to more disclosure on the one hand, and on the other hand prevent disclosure (whereby, it should be noted the prevention does not have the effect that the leniency applicant will be protected against claims). The disclosure system has something schizophrenic and in fact, it could be assumed that it helps neither the leniency applicant nor the claimant.

By aligning the leniency policy, to a larger extent, with private enforcement and providing a waiver or reduction in the damages to be paid by the immunity recipient in return for requiring them to provide information to claimants about the infringement, the effectiveness of the leniency policy and overall competition law enforcement could be improved even further. In addition, more victims would become aware of cartel infringements because of the more effective leniency policy. When it comes to civil proceedings, the immunity recipient, who has a considerable amount of the relevant information in most cases, would assist claimants.

As leniency appears to be the crucial fundament for effective public enforcement and private enforcement, other measurements to improve the leniency policy could also be considered or further developed. As discussed, a number of elements could be used to make the leniency policy and hence ultimately competition law enforcement more effective overall. With even more certainty, transparency, predictability and better safeguards for undertakings to be treated equally, it could be possible to make the policy even more effective. Fortunately, the European Commission recently spread its proposed Enforcement Directive. Preferably, however, a new enforcement directive should not only set out binding leniency rules, but also clear self-explanatory reductions in fines, the same rules across the whole of the EU and, preferably, the introduction of a one-stop leniency shop system for cross-border cartels.

Chapter 7

Summary and Conclusions

7.1 Introduction

One of the main questions raised at the start of this study was whether a leniency policy would be jeopardized by the emergence of private enforcement as an enforcement tool. The answer is that if the cost-benefit analysis conducted by a leniency applicant before applying for leniency is negatively affected, for example, because of an increase in private damages actions against the leniency applicant, then this will indeed jeopardize the leniency policy and, in turn, the overall effectiveness of competition law enforcement. This is congruent with the observations of several economists, who came to the same conclusion based on their economic models and research. It also confirms what the CJEU and several legal scholars already thought about the relation between leniency and (an upcoming) private enforcement.

This study also investigates possible measures to prevent a leniency policy from being jeopardized by the emergence of private enforcement as an enforcement tool and to make the leniency policy even more effective.

7.2 Findings

As discussed in Sections 2.3, 2.4 and 2.5, over the last ten to twenty years, both competition authorities and policymakers in Europe have put a great deal of effort into improving their leniency programmes. These improvements include the following: making leniency more financially attractive (cost-benefit analysis); improving clarity; increasing predictability; and securing the principles of equality and transparency. This has resulted in many more leniency applications being submitted, both at the EU level and at the national level in Germany and the Netherlands. In turn, this has led to many more cartels being detected.

The leniency policy has proved to be successful. The European Commission has stated that the detection of up to 70 — 80 percent of cartels is because of the existence of its leniency programme. Leniency is of the utmost importance in the fight against cartels. In Germany and the Netherlands, these figures, according to the national competition authorities, are not as high, but even in these countries the importance of an effective leniency programme is acknowledged by the competition

authorities. Even though the leniency policies of the EU, Germany and the Netherlands have improved tremendously, there are still elements that negatively influence the cost-benefit analysis. Also, the lack of clarity and predictability in leniency programmes and the sub-optimal guarantees to secure the principles of equality and transparency are considerably hindering the development of a more effective leniency policy. Five bottlenecks have been recognized.

The unpredictability of policy rules
Non-binding policy rules often provide competition authorities with broad discretion in setting fines. In particular, competition authorities have a certain amount of freedom to reduce fines. In turn, this makes the exact level of fine uncertain. This unpredictability is further exacerbated if policy rules can be quickly implemented or amended without democratic oversight and if courts are not bound by policy rules. As a consequence, policy rules are less reliable than statutory provisions.

Independent decision-makers
The decision-makers of the European Commission and the ACM are under the direct control of those who are also responsible for investigations into competition law infringements. In the Netherlands, the government has even set targets for the fines that should be issued each year. Undertakings could conclude that setting and reducing fines also depends on elements lacking procedural fairness. If the process of reducing the fine generates doubt and fear in undertakings, even if this doubt and fear are unjustified, they consider the leniency policy to be less predictable, less transparent and less certain — problems that influence their decision-making and the effectiveness of the leniency programme.

Differences between the leniency policies of different competition authorities
The differences between Member States, for example in de reduction of fines, also create a lack of clarity, lack of transparency, unpredictability and inequality. Although the leniency policies have been brought more in line through the ECN co-operation process, practice has shown that differences still exist.

Multiple filing
Not only do the rules of different competition authorities differ from one another, but it could also be uncertain which competition authority will actually handle a specific case. This results in further ambiguity for leniency applicants. Leniency applicants do not always know exactly where to secure their place in the leniency queue. To ensure a correct leniency application, a cartel infringer must apply for leniency with all the competition authorities that could potentially handle the case. This brings uncertainty. Furthermore, it is inefficient and a huge burden for applicants. This is particularly true if different authorities ask questions and require information simultaneously from the same applicant and about the same cartel.

Balancing Leniency and (an upcoming) Private Enforcement
As shown in Sections 4.2 and 4.3, private enforcement has been an integral part of competition law for a relatively long time in both Germany and the Netherlands. However, it was rarely employed by the victims of cartel infringements before 2001. The CJEU decisions *Courage v Crehan* and *Manfredi,* as well as papers and (draft) pro-

posals for legislation produced by the European Commission, have all helped raise awareness amongst the various parties of the existence of this area of law.

Within the European Union, the United Kingdom, Germany and the Netherlands are the countries with the most private damages claims pending in the courts.

This study has shown that private enforcement cases for cartel infringements are usually "follow-on cases", i.e. litigation by private-sector parties commenced after the public enforcement process of the competition authorities. Even more interestingly, a leniency application assisted in uncovering or proving most of these cases of enforcement by the competition authorities. The publicity surrounding public enforcement cases and the information disclosed in them, often as a result of the publication of a decision by the competition authority, appears to have given rise to private enforcement actions.

Since the effectiveness of a leniency programme largely depends on its benefits to the leniency applicant, all the relevant disadvantages that come from applying for leniency must be taken into account. As shown in this study, the risk of damages to be paid by the immunity recipient, could — certainly if private enforcement evolves and does provide compensation for all victims resulting in an enormous exposure for infringers — negatively influence the effectiveness of the leniency programme.

This study also shows that claimants are heavily dependent on the information provided by an insider. One of the difficulties for the victims of a cartel infringement is that, without a whistleblower, the existence of a cartel is and often remains unknown. Even if a cartel has been identified, there are many hurdles to prove that it was responsible for the occurrence alleged by the claimant to have caused the harm. With only a suspicion and without solid information, a claimant has no option but to go to court if a suspected cartel infringer does not voluntarily provide the claimant with the relevant information. Because of the uncertainty about the outcome for information requests, possible compensation, the costs and efforts involved in an application for disclosure, and the calculation and estimate of the damage, victims are often hesitant about starting proceedings at all. In practice, it appears that almost all damages claims are preceded by public enforcement proceedings. The public enforcement case provides the necessary information to make it both possible and appealing for cartel victims to claim damages.

The information asymmetry, which puts claimants at a disadvantage, is partly removed by the Antitrust Damages Directive. This is done firstly by presuming that a cartel is harmful. It is then up to the defendant to refute this presumption. This changes the legal positions of the claimant and the defendant and makes it easier for victims to successfully claim damages. Secondly, the inclusion of special provisions for indirect purchasers and providers also shifts the legal positions of defendants and indirect claimants. This makes it easier for indirect victims to successfully claim damages. Thirdly, the Antitrust Damages Directive makes clear what information needs to be provided and states that almost all information, except for leniency statements and the settlement submission, can be disclosed.

With the introduction of these new provisions, the amount of stand-alone cases could possibly increase because of the special disclosure provision. However, the new provisions do not provide many more disclosure opportunities than already familiar to the Netherlands. From the victims, it is still expected to provide reasonably available facts and evidence sufficient to support the plausibility of the claim for damages. Furthermore, it should be noted that with the new Antitrust Damages Directive, there are no incentives to actively search for (new) infringements. As long as the process does not have far reaching pre-trial discovery rights, compensation for the actual legal fees and costs, and treble damages, as there are in the United States, a large increase in stand-alone cartel cases should not be expected.

Similar to the German and American systems, the Antitrust Damages Directive contains a special limitation period provision that makes it possible to await the outcome of a public enforcement case without risking the expiry of the limitation period. This could be an advantage for claimants, who would then be able to await the outcome of the public enforcement case without fearing that the limitation period would expire. The new directive's limitation period provision, however, is not completely clear and could lead to a really long limitation period. This means that for a long time, defendants will not be certain who will claim damages from them. Moreover, the limitation period is still not the same in each and every Member State. In practice, a long limitation period also prevents defendants from being willing to settle because the fear exists that other claimants will stand up afterwards. Furthermore, the limitation period could differ from infringer to infringer because a decision could be final for one infringer, but not for the others.

The *Masterfoods* case was meant to provide clarity, to prevent difficulties and differences from occurring as a result of the various decisions of the European Commission and those of national courts. However, in private enforcement damages actions, the Masterfoods defense often cause delays in civil proceedings. National courts delay making their own final decisions in antitrust damages actions for as long as the European Commission's decision is not yet final. As public enforcement procedures can take many years, claimants would then have to wait a long time for compensation. The leniency applicant can also be disadvantaged in civil proceedings because of its participation in the leniency process, because the enforcement decision about it could be final before that of the other cartel infringers (if it has chosen not to appeal). This has the unintentional outcome of making the leniency applicant an appealing party for claimants to sue. That is the case even more so if the limitation period for the leniency applicant ends earlier in time. The Antitrust Damages Directive does not provide clarity on how national courts should deal with the Masterfoods defense and the possible delays that can be caused in antitrust damages actions when the court allows the proceedings to be delayed pending the outcome of the public enforcement process. Indirectly, the Antitrust Damages Directive does provide a solution for the first leniency applicant by partly removing the applicant's joint and several liability. This means that (in most cases) not all claimants will be able to receive complete compensation from the leniency applicant, thereby making the leniency applicant a less attractive party to sue.

7.3 Recommendations

The Antitrust Damages Directive seeks to ensure the effective enforcement of EU competition rules, firstly, by optimizing the interaction between public and private enforcement and, secondly, by ensuring that the victims of EU competition rules infringements can obtain full compensation for the harm they have suffered. With these aims in mind, this study discusses several proposals to optimize the effectiveness of competition law enforcement.

To make the leniency policy even more predictable, it should not be incorporated into the legal system in the form of ECN recommendations and policy rules, but laid down in binding legislation. This would mean that competition authorities would have to obey the rules, that both they and the policymakers would not be able to change the rules so easily, and that it would be subject to democratic oversight. It would also mean that the courts would have to abide by the rules. For cartel infringers, this would provide more clarity, more predictability and more certainty that the rules are being applied in accordance with the principles of equality and transparency.

Clarity, predictability and certainty would be further enhanced if the leniency policy was based on binary tests for a reduction in fines in exact amounts, without the competition authority having the discretion to decide the level of reduction. The first undertaking to provide significant added information would, for example, receive a set 50 percent fine reduction, the second a set 30 percent reduction, and subsequent undertakings a set 20 percent reduction.

As is the case in the German system, it would be preferable if the decision-makers setting the fine were completely independent from investigating officials, executives and policymakers. For undertakings, this could increase trust in the actions of the competition authority and in the exact fines (including eventual reductions) set by the competition authority.

Differences in the systems of the individual Member States should be eliminated. Until now, it has been virtually impossible to fully harmonize the leniency policies of various Member States. A fully harmonized policy would more likely provide clarity, predictability and certainty that the principles of equality and transparency were being taken into account. This would also be more cost-effective, as both the legal costs and effort would be reduced. Cartel infringers would no longer require advice on the policies of each Member State, as well as that of the European Commission, but could just rely on a single, simplified, general letter of advice.

Predictability could be further enhanced by introducing a “one-stop leniency shop” for cases involving cross-border cartels.

In this study, it has become clear that the current ECN Model Leniency Policy does not provide a one-stop leniency shop. The cartel infringer has to currently apply for leniency in all Member States where the possibility of a cartel infringement exists, as well as with the European Commission. Moreover, in the existing system

an applicant may receive questions from, and have to provide information to, all those various competition authorities at the same time.

With a one-stop shop, it would be up to the competition authorities to discuss and decide which would be the best authority or authorities to handle a case. A one-stop shop would make it easier, more straightforward and more cost-effective to apply for leniency. A system dealing with the application for the whole of the EU in one place would provide more certainty for undertakings, particularly with regard to whether they would receive immunity or a fine reduction. A one-stop shop could be achieved making it clear that the European Commission's marker would have effect in all Member States.

Regarding private enforcement, to receive compensation, it is first necessary to have knowledge of the infringement that has caused the victims harm. Because cartel participants operate under the radar and often do their utmost to keep the cartel secret, it is difficult to become aware of these infringements.

The Antitrust Damages Directive provides a disclosure provision, making it easier to receive information from cartel infringers. However, some kind of clear suspicion, with facts, must first exist and so it remains questionable whether this will trigger potential victims into starting stand-alone case proceedings.

With regard to the disclosure of information, it is sometimes argued that the disclosure of leniency information from the competition authority's record creates a disadvantage for the leniency applicant. However, as this study shows, the attractiveness of applying for leniency could be jeopardized if the cartel becomes known to the public, even without specific leniency information. This could transpire, for example, through a competition authority's decision to set a fine.

The risk of claims, especially if claiming becomes widely adopted and substantial, may dissuade cartel infringers from submitting a leniency application and could therefore undermine their willingness to apply for leniency. The risk of claims is what matters for analyzing the risk of private enforcement, not the risk of being in a worse position than the co-infringers. It highlights the link between public and private enforcement. It also shows that protecting leniency information is of limited relevance, as this information often appears unnecessary for claimants to start proceedings per se. Moreover, the protection for the leniency applicant is quite minimal. The leniency documents, with the exception of the corporate statement, can be subject to disclosure, once the authority has closed its investigation or made a decision. Hence, in the end, most of the documents could be subject to disclosure.

The solution brought in by the Antitrust Damages Directive is the partial removal of joint and several liability for the immunity recipient. In principle the immunity recipient is relieved from joint and several liability for the entire harm and any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm

to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. The immunity recipient remains fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

In fact, the scope of the damages to be paid by the leniency applicant does not differ much from the compensation it had to pay prior to the implementation of the Antitrust Damages Directive provision. In the end, all cartel infringers should pay their share of the damages. Even without the special provision on joint and several liability, the contribution payable by the cartel infringers appears in many cases not to be that different from the previous situation. This could be different if one or more of the other infringers is/are not able to pay for compensation. In such event, the immunity recipient could have a financial advantage in the new situation.

Probably a more important benefit for the immunity recipient is that the immunity recipient becomes far less appealing for claimants as a (full) litigation target because it can only be obliged to pay a specific part of the compensation.

It remains questionable whether in applying for leniency these advantages would outweigh the downside of having to pay — at least in theory — the damages caused to their direct and indirect purchasers and providers and their relative share of the damages to others than direct and indirect purchasers and providers. The contribution obligation could very well overshadow the potential fines of the European competition authority(ies) in the future.

If the Antitrust Damages Directive were intended to prevent leniency policy from being jeopardized, whilst at the same time to encourage the victims of competition law infringements to claim for damages, the obvious solution would have been to impose an obligation on a leniency applicant to assist claimants in their antitrust damages actions. In return, the leniency applicant should receive an additional bonus as an incentive to apply for leniency, such as a waiver or reduction of the compensation that it would otherwise have had to pay.

Such a system similar to that used in the United States and the previous system in Hungary would give leniency applicants an extra incentive to apply for leniency and would most likely make the leniency policy even more effective. In addition, it would also make it easier for claimants to receive compensation, as it happens in the United States.

A special limitation period for antitrust damages claims is justified, because the judgment in a private enforcement case can often not be treated separately from the public enforcement case. The Antitrust Damages Directive does provide a solution, but this solution has drawbacks: it requires a complex calculation; the limitation period can be extremely long and the limitation period is not necessarily the same for all cartel infringers and could differ per Member State. The long period especially does not facilitate case settlement. It would have been more

straightforward if the limitation period had been set to expire, for example, half a year or one year after the last competition decision in relation to the infringement has become final and irrevocable. Such a provision would be clear. For defendants, it would become clear who might possibly claim damages half a year or one year after the decision of the competition authority. After this period, the defendant can settle disputes with claimants without fearing the emergence of new unknown claimants.

The Masterfoods defense appears to be an extra hurdle for leniency applicants because it could potentially result in a situation where the decision for the leniency applicant becomes final and irrevocable but the decisions for the other cartel infringers are not. Claimants would then be able to claim from the leniency applicant with immunity, but not yet from the other cartel infringers, as their decisions would still be outstanding. To minimize the risk of being the first party sued civilly for damages, the immunity recipient could appeal the decision of the competition authority to prevent it from being placed in this adverse position. A positive side effect of partly removing joint and several liability from the immunity recipient, as stated in the Antitrust Damages Directive, would be to make the immune leniency applicants a less appealing target for claimants, as only part of the overall damages could be recovered from them.

7.4 Final Conclusions

The difficulty with competition law is that so many aspects can influence its overall effectiveness. Sanctions in criminal law or the emergence of private enforcement, for example, may influence leniency policy. In turn, public enforcement, whilst protecting information, could also influence the effectiveness of antitrust damages actions.

A comparison can be made with the board game “Pisa”. In this game, small figures have to be placed at different levels of the Leaning Tower of Pisa, with the aim of keeping the tower stable. When there are too many dolls on one side and not enough on the other, the balance is lost and the figures topple off the tower. Competition law enforcement is a leaning tower of Pisa. If the structure of an effective competition law policy is not sufficiently balanced between public and private enforcement, then it will function less effectively than it could.

It is important to strike the right balance so that claimants are able to effectively claim damages on the one hand, but cartel infringers remain interested in applying for leniency on the other. The public enforcement system is effective only if infringers apply for leniency and the same is true for private enforcement.

This study has demonstrated the absolute importance of leniency applications for successful public enforcement, and indeed for successful private enforcement. It can be assumed that without leniency applications there would be almost no private enforcement in relation to cartels in Germany and the Netherlands. This means that the primary focus of policymakers has to be on an effective leniency programme.

The Antitrust Damages Directive includes several provisions that make leniency policy more effective. However, the Antitrust Damages Directive pays no attention to improving clarity or predictability or to securing the principles of equality and transparency in the leniency policy itself. Competition authorities continue to have large amounts of discretion in how they apply the leniency programme. Significant differences remain between the leniency programmes of the various competition authorities. The Antitrust Damages Directive does not provide a solution for difficulties relating to multiple leniency filings, or to the hurdles that multiple filings can bring for cartel infringers who want to apply for leniency. The removal of these hurdles would help create clarity and predictability and, in turn, could make leniency policy even more effective. Unfortunately, also the Enforcement Directive as proposed by the European Commission does not provide a solution for these differences and uncertainties.

It has been shown that the Antitrust Damages Directive does provide certain elements to protect the balance between public and private enforcement. On one hand, it provides greater guidance and assistance to claimants, whilst on the other hand it makes some attempt to protect the leniency applicant by safeguarding certain documents and by removing joint and several liability to a certain extent.

This study has established that, in a cost-benefit analysis, the benefits for the leniency applicant will be reduced as a result of the emergence of private enforcement. The measures suggested by European lawmakers regarding the protection of documents from disclosure do not protect the leniency applicant. In fact, the suggested system could be considered a lose-lose situation. The solution that would assist the leniency applicant is the partial elimination of joint and several liability. However, this provision does not, to a large extent, provide a financial benefit. The main advantage would come from preventing the leniency applicant from being the most appealing defendant to sue in the first place. Even if the new liability provision provided a financial benefit for an immunity recipient that is sufficiently interesting, it would be a win-lose solution. Cartel victims do not directly profit from the financial and other advantages received by the immunity. They are not assisted by the immunity recipient.

One solution is that the first leniency applicant (i.e. the immunity recipient) provides information and assistance to claimants in exchange for additional benefits, such as a waiver or (further) reduction in the damages to be paid. Such a provision, which appears to work in the American system and is supported by several economists in economic models and economic research, would help to balance the overall competition law enforcement system.

Cartel infringers would then have an additional reason to apply for leniency, as their liability for antitrust damages actions would be reduced. With such a provision, the damages to be paid by the other cartel infringers will be higher (bigger sticks), which means that being the first to apply for leniency is even more attractive (sweeter carrots). If the immunity recipient assists in antitrust damages claims, it would also become easier for claimants to effectively claim damages. This could

lead to even more out-of-court settlements. Such a system could be considered a win-win situation.

In this study, it is clear that an integrated approach of both public and private enforcement is needed. The two fields of law should not function against each other, e.g. by protecting the leniency policy against civil proceedings, but work effectively together by providing additional benefits for the immunity recipient and assisting private claimants in antitrust damages claims. By doing so, an effective chain of competition law enforcement could be created, starting with as many leniency applications as possible, followed by clear and effective fines from the competition authorities, and finished by compensating as many cartel victims as possible.

Samenvatting en conclusies

De meeste beleidsmakers en wetenschappers zijn het erover eens dat kartels de belangen van consumenten en de welvaart schaden en daarom hoge boetes vereisen.

Het blijkt echter nog niet zo eenvoudig kartels op te sporen. Deelnemers aan een kartel worden daarom aangemoedigd bij de mededingingsautoriteiten het kartel te onthullen. Zo hebben zij de mogelijkheid om bestuurlijke boetes te voorkomen of te verminderen. Voor mededingingsautoriteiten is dit clementiebeleid een belangrijk instrument om kartels te bestrijden. Het overgrote deel van de Europese kartels wordt zelfs via het clementiebeleid ontdekt.

Vooral aan het begin van dit millennium begon de Europese Commissie ook met het aanmoedigen van de civiele handhaving van het mededingingsrecht, om inbreuken op de mededingingsregels aan te pakken en consumenten te beschermen. Volgens de Europese Commissie moesten slachtoffers van kartels worden geholpen om civiele procedures tegen kartelovertreders te starten en om de schade op hen te verhalen. De afgelopen jaren heeft de civiele handhaving een meer prominente rol gekregen binnen het mededingingsrecht en de verwachting is dat de civiele handhaving van het mededingingsrecht een nog prominentere rol zal krijgen.

Een probleem dat zich kan voordoen, is dat de civiele handhaving en het clementiebeleid elkaar tegenwerken. Een bedrijf dat clementie aanvraagt, is niet gevrijwaard van civiele rechtszaken, aansprakelijkheid en schadeclaims. Een verscheidenheid aan juristen en (andere) wetenschappers verwacht dat door meer civiele claims het clementiebeleid minder aantrekkelijk wordt. Zelfs bij een 100% boetevermindering kan clementie minder interessant zijn, indien de civiele claims als een zwaard van Damocles boven het hoofd van de clementieverzoeker blijft hangen.

Daarmee staat de Europese Commissie voor het volgende dilemma. Aan de ene kant moedigt de Europese Commissie als beleidsmaker de civiele handhaving van het mededingingsrecht aan. Aan de andere kant beschermt de Europese Commissie, als 'openbare handhaver' van het mededingingsrecht, de functionaliteit van de publieke handhavingsinstrumenten, en met name de aantrekkelijkheid van het clementieprogramma, als middel om kartels te ontdekken.

In deze studie wordt onderzocht wat de relatie is tussen het clementiebeleid en de civiele handhaving van het mededingingsrecht. Daarbij wordt ook gekeken wat noodzakelijk is voor een zo effectief mogelijke algehele handhaving van het mededingingsrecht en worden de regels voor publieke handhaving en private handhaving in de EU, Nederland, Duitsland en de Verenigde Staten geanalyseerd en vergeleken. Het Amerikaanse systeem voor clementie en civiele handhaving is daarbij als inspiratiebron gebruikt en de systemen in de EU, Duitsland en Nederland zijn het pri-

maire onderwerp van dit onderzoek, waarbij ook de recente Richtlijn schadevergoedingsacties wegens inbreuken op het mededingingsrecht besproken wordt. De auteur koos naast het Nederlandse systeem voor Duitsland en de Verenigde Staten vanwege de geschiedenis en de ontwikkeling van het mededingingsrecht in beide landen.

Binnen Europa is Duitsland een van de grondleggers van het Europese mededingingsrecht. Volgens verschillende Duitse wetenschappers was het Europese mededingingsbeleid aanvankelijk gemodelleerd naar het Duitse mededingingsbeleid. Ook nu nog houden Duitse economen en juristen levendige discussies over het mededingingsrecht. Ze hebben grondig onderzoek gedaan naar de effecten van het clementiebeleid en de private handhaving en er in Duitsland veel kartelschadeclaims in behandeling zijn. Bovendien is Duitsland interessant omdat het als een van de eerste landen in Europa speciale bepalingen invoerde in de wetgeving ten behoeve van een effectievere civiele handhaving. Duitsland is ook om andere redenen interessant. De Duitse mededingingsautoriteit bestaat al meer dan vijftig jaar, veel langer dan de Nederlandse autoriteit. Bovendien keek de Nederlandse wetgever bij het creëren van de Nederlandse Mededingingswet ook nauwlettend naar het Duitse systeem.

Amerikaanse mededingingswetgeving, oftewel 'antitrustwetgeving' waarnaar in de Verenigde Staten wordt verwezen, evolueerde al aan het einde van de negentiende eeuw vanwege de gevoelde noodzaak om de consument te beschermen tegen de ongebreidelde uitbreiding, samenwerking en consolidatie van bedrijven als gevolg van de industrialisatie. Sindsdien is de Amerikaanse antitrustwetgeving een voorbeeld voor de rest van de wereld geworden om een concurrerende markt te handhaven en consumenten te beschermen tegen concurrentieverstorend gedrag. De Verenigde Staten zijn onder meer interessant vanwege de ervaring met kartelschadeclaims, collectieve acties, het systeem van punitieve schade, de hulp van claimende partijen door clementieverzoekers en het verregaande disclosure regime. De Amerikaanse antitrustwetgeving wordt bestudeerd om lessen te trekken met het oog op de civiele handhaving in de EU.

In deze studie wordt het absolute belang van een goed werkend clementiebeleid voor de succesvolle publieke handhaving en zelfs voor de succesvolle private handhaving van het mededingingsrecht duidelijk. Uit het onderzoek blijkt dat er zonder clementieverzoeken nauwelijks civiele handhaving in Duitsland en Nederland zou plaatsvinden. De auteur komt dan ook tot de conclusie dat — om de effectiviteit van het mededingingsrecht te beschermen of te verbeteren — de focus van beleidsmakers op een effectief clementieprogramma zal moeten (blijven) liggen.

Het onderzoek laat zien dat een clementiebeleid effectiever wordt naarmate de volgende twee voorwaarden beter worden ingevuld. (i) Op basis van een kosten-batenanalyse moet het doen van clementie zo aantrekkelijk mogelijk zijn en (ii) het beleid moet de beginselen van gelijkheid, transparantie, voorspelbaarheid en rechtszekerheid in acht nemen. Hoe beter deze voorwaarden worden ingevuld,

hoe effectiever het clementiebeleid en daarmee ook de handhaving van het mededingingsrecht zal zijn.

Er lijkt nog ruimte te zijn om deze voorwaarden beter in te vullen. De auteur concludeert onder meer dat mededingingsautoriteiten in Europa nog altijd een grote discretionaire bevoegdheid hebben bij de manier waarop zij het clementieprogramma toepassen. Het gaat dan bijvoorbeeld over de relatieve vrijheid bij de toe te passen boeteverminderingen. Dit komt de transparantie, voorspelbaarheid en rechtszekerheid niet per se ten goede. Er blijven bovendien aanzienlijke verschillen te bestaan tussen de clementieprogramma's van de verschillende mededingingsautoriteiten. Het wegnemen van de onduidelijkheden en onvoorspelbaarheden zou het clementiebeleid effectiever kunnen maken.

Helaas biedt ook de door de Europese Commissie voorgestelde Richtlijn schadevergoedingsacties wegens overtredingen op de mededingingsregels geen oplossing voor deze verschillen en onzekerheden.

Deze studie laat zien dat de voordelen voor de clementieverzoeker zullen afnemen als gevolg van meer private handhaving. Dat heeft een negatief effect op de tweede voorwaarde: de kosten-batenanalyse, en daarmee tevens op de effectiviteit van het clementiebeleid.

In het kader van de kosten-batenanalyse is met de Richtlijn schadevergoedingsacties wegens overtredingen op de mededingingsregels getracht het clementiebeleid zo aantrekkelijk mogelijk te houden en de nadelen van de civiele handhaving te minimaliseren. Het onderzoek laat echter zien dat de door de Europese wetgever genomen maatregelen met betrekking tot de bescherming van documenten tegen openbaarmaking de clementieverzoeker maar zeer beperkt beschermen. In feite zou het voorgestelde systeem als een verlies-verliesoplossing kunnen worden beschouwd. Immers, de oplossing die de clementieverzoeker kan helpen, is de gedeeltelijke afschaffing van hoofdelijke aansprakelijkheid en de bescherming van de clementieverklaring. Hiermee is niet gegeven dat de clementieverzoeker met immuniteit minder schadevergoeding moet betalen. Bovendien betekent de bescherming van de verklaring niet dat geen civiele procedures zullen volgen. Het grote voordeel zou zijn dat de clementieverzoeker niet de meest aantrekkelijke gedaagde is om in de eerste plaats tegen te procederen. Zelfs als de nieuwe aansprakelijkheidsbepaling een (financieel) voordeel biedt voor een ontvanger van immuniteit, zou de gekozen oplossing hoogstens als een win-verliesoplossing kunnen worden bestempeld. De slachtoffers van kartels profiteren niet rechtstreeks van de financiële en andere voordelen die de immuniteit biedt. Anders dan in de Verenigde Staten worden de slachtoffers door de ontvanger van de immuniteit niet geassisteerd bij civiele procedures jegens andere kartelovertreders, blijft informatieasymmetrie waarschijnlijk een belangrijke hobbel voor slachtoffers van kartels en blijft het complex schade te verhalen.

Met deze studie wordt duidelijk dat een geïntegreerde aanpak van zowel publieke als private handhaving nodig is. De twee rechtsgebieden mogen elkaar niet tegenwerken, bijvoorbeeld door het clementiebeleid te beschermen tegen civiele proce-

dures, maar dienen effectief samen te werken door extra voordelen te bieden aan de ontvanger van de immuniteit en door slachtoffers bij te staan in schadevergoedingsclaims met betrekking tot kartelschadezaken. Op die manier kan een effectieve keten van handhaving van de mededingingswetgeving worden gecreëerd, te beginnen met zo veel mogelijk clementieverzoeken, gevolgd door duidelijke en effectieve boetes van de mededingingsautoriteiten, en eindigend met zo veel mogelijk kartelslachtoffers die worden gecompenseerd.

Voorgesteld wordt in de studie dat de eerste clementieverzoeker (d.w.z. de ontvanger van de immuniteit) aan eisers informatie en hulp verstrekt in ruil voor aanvullende voordelen, zoals de uitsluiting van civiele aansprakelijkheid, althans een (verdere) vermindering van de te betalen schadevergoeding. Een dergelijke bepaling, die werkbaar lijkt in het Amerikaanse systeem en wordt ondersteund door verschillende economen in economische modellen en economisch onderzoek, helpt om het algehele handhavingssysteem voor mededingingswetgeving in evenwicht te houden.

Kartelovertreders zouden zo een extra reden hebben om clementie aan te vragen, aangezien hun aansprakelijkheid voor schadevergoedingsacties met betrekking tot antitrustmaatregelen verminderd wordt. Met een dergelijke bepaling zal de door de andere overtreders van het kartel te betalen schadevergoeding hoger zijn (bigger sticks), uitgaande van volledige compensatie voor alle slachtoffers. Dat betekent tevens dat de eerste die om clementie verzoekt in een nog aantrekkelijker positie geraakt (sweeter carrots). Als de immuniteitsontvanger assisteert in schadevergoedingsclaims op het gebied van antitrustzaken, wordt het bovendien makkelijker voor eisers om effectief schadevergoeding te eisen. De thans bestaande asymmetrie wordt dan namelijk (in ieder geval grotendeels) opgeheven. Dit zou net als in de Verenigde Staten kunnen leiden tot meer buitengerechtelijke schikkingen. Een dergelijk systeem zou dus als een win-winoplossing kunnen worden beschouwd.

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